Hen. Bedingfield
Edw. Atkyns
T. Street
T. Wyheus
Ric. Holloway
Rob. Wright
Tho. Jenner
Ed. Lutwyche
Rich. Heath
Chr. Milton
John Powell

WE do allow the Printing and Publiſhing of the REPORTS in the Court of King's-bench at *Weſtminſter*, in the Reign of our late Sovereign Lord King *CHARLES* the II^d^. Taken by *Joſeph Keble* of *Gray*'s-Inn, Eſq;

June 2. 1686.

Hen. Bedingfield
Edw. Atkyns
T. Street
F. Wythens
Ric. Holloway
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REPORTS

IN THE

Court of Kings Bench

AT

WESTMINSTER,

FROM

The XII to the XXX Year of the Reign of our Late Sovereign Lord

King Charles II.

Taken by *Jos. Keble* of *Greys-Inn* Esquire.

The First Part:

Containing the 13th, 14, 15, 16, & 17th Years.

LONDON,

Printed by *W. Rawlins*, *S. Roycroft* and *M. Flesher* Assigns of *Richard* and *Edward Atkins* Esquires.

For *Thomas Dring*, *Charles Harper*, *Samuel Keble*, and *William Freeman* in *Fleetstreet*. MDCLXXXV.

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TO THE

READER.

THE Multitude of Books is no Complaint of Learned Men, but of such as are Lazy or Covetous, who like nothing of Charge or Industry, tho they be not obliged to either; and for such means of Knowledge as these, being in the Vulgar Tongue, since our Law-makers and such as argued these Cases have used the most Common and Comprehensive Ways to Express themselves, I see no Reason but such as derive from them should use the same; especially since all the Judges of *England* do (*for the Common Good*) allow and approve the Publishing of the Third Part of Justice *Crooke*'s and other Reports in the same Letter and Dialect as Printed. And it appears by the 1. *Inst.* 304. and *Davis* 3. the *Preface*, and *Selden*'s History of *Tythes* 485. that the first *Reports* in *French* were the Genuine or Vulgar Language used in those Times in Courts of Justice: And as to the Cases, I chose rather to present them as Rudely, as taken, with the Particular Times of Debate and such Number Rolls

thereof as I then had: then by a more Methodical Digeſtion to obſcure the Truth and Certainty of the Matter. And on conſideration of the Various Accidents that happen from the Beginning to the End of a Caſe, I knew no better way to expreſs it.

There are generally through every Part of this Work many Leſſer Matters tranſacted in the Court, interwoven with Things of much greater Weight and Moment, which to the Judicious at firſt View may ſeem Trivial and Light; yet, upon a due and ſerious Conſideration, I hope you will find, that there is nothing here contained, but the Knowledge thereof in the Courſe of Study and Practiſe, may to ſome be of Uſe and Benefit; And for my Opinion in this Particular, I have the Authority of my Lord *Coke*, who in his *Firſt Inſtitutes fo. 9. A.* ſays, *That there is no Knowledge, Caſe, or Point in Law, ſeem it of never ſo little Account, but will ſtand the Student in ſtead one Time or other, and therefore nothing to be pretermitted:* And tho Miſtakes be herein, I aſſure you none are Wilful; and I cannot doubt your Candour in Pardoning and Amending the Reſt.

Grayes-Inn May *the* 5th. 1685.

JOSEPH KEBLE.

A NEW

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DE

Termino Paſchæ

1661. An. 13 *Car.* II. in *Banco Regis.*

Foſter *Chief Juſtice.*

May 1. Mallet, Twiſden, Windham.

Gable *againſt* Foreſter.

(1) Infant. In Action upon the Caſe.

ASſumpſit on a Promiſe to an Infant, that if he paid money the Def. will make Aſſurance, this is not void, but voidable at Election of the Infant, as Dives and Maningtons Caſe. If Infant will permit J.S. to enjoy Lands, J.S. will pay ſuch a Sum, this is good (and this on motion made in Arreſt of Judgment) but the very Promiſe was to Infant, if he forbear ſuing the Defendant, which is good Cauſe of Action be the Promiſe void or true; and Judgment pro Plaintiff.

Robins *verſus* Warwick.

(2) Aſſignee. 1 Brownl. 20. Pl. 86. In Dett 161. Br. 94. Dy. 307. b. pl. 70. 3 Cr. 851. pl. 7. 2 Cr. 112. pl. 10 Annuity Cr. 33. 6 H. 4. 7. b. pl. 33.

B. Being ſeiſed in Fee, demiſed to N. for 21 years, rendring 30 l. per an. and after B. grants the Rent without Attornment to R. who brought Debt againſt the Leſſee for this Rent, and Powis moved in Arreſt of Judgment, that this is only a Rent Seek, for which he ſhall not have Debt for want of Privity, as on Com. 524. 7 Co. 23 of Eſtate & Contract alſo; and it is

not the Contract nor the Estate alone, 9 H. 6. 13. pl. 1. per Paston. And by Justice Windham this Grant is void, Co. Lit. 159. b. In case of Estate for Life there is not any remedy without Seisin, but this is only a Chattel, and Debt is the proper Remedy; and this is a personal thing with which the Contract remains, Mallet ad idem. Twisden doubts, because this is a growing Rent (and not determin) that therefore he cannot distrein there being no privity of Estate, and one may have a Rent sans Remedy, and therefore Debt nest necessary. Foster Ch. J. If the Grant had been with special Attornment to charge the Tenant, this might be, but if otherwise, he much doubts. It was agreed, That Annuity in this case lyeth not, &c. Quære also if Executors on the death of cestuy que vie (who never had Seisin of a Rent-seck) shall have Debt. Adjornatur.

Debt F. 161. i. e. The Law is defective. 9 Co. 9. the 2 Reason. So on fine levy of Rent in writ of Customs and Ser. the Conusee cannot have a Sc. Fa. nor can he distrain unless he be seised, 10 Ed. 3. 16. b. Pl. 3. Dy. 9. b. Pl. 28.

Dr. Witheringtons Case.

(3) Mandamus videan. 216. Assize. Si fuit del formation cel Roy tenement may be present. For withdrawing his Rent. 27 Ass. 20. 18 Ed. 3. 27. Pl. 24. It was rul'd that a possessor Sarjant del esglise precipe or Formedon lay but against the Evesq; or Dean and Chapter only a permittat 41 Pl. 73. §. 3. Simile.

ALlen moved for Mandamus for Dr. Witherington Fellow of Christ College, because that although the University hath Visitors, yet this doth not take away the Jurisdiction of this Court (and a Fellowship is a Temporal Living for life. Jones for the Colledg said, That the Colledg had particular Statutes whereby they must judg; and he and Twisden Justice said, That the first President in this Case was not above 10 years ago, but Arthur Trevor cited a President in the time of Ed. 3, Foster Ch. J. and Windham Justice said, That if they certifie cause of which they have the Jurisdiction, the Court will remit it to them, and until they do wrong, it shall not be amended here, if it be according to their Statutes or Power. Adjornatur.

(4) Evidence.

Nota. That a printed Copy de private Act of Parliament or Ordinance obsolete, was disallowed to be given in evidence by all the Court, unless it had been examined by the Original.

. . . . *versus* Newcomb.

(5) Error. Error of enquiry

JOnes moved to stay the filing of a Writ of Enquiry on an especial Plea pleaded, and Issue taken, and a Demurrer is after joyned, that being not tryed nor waved.

Heath

Heath *versus* Paget.

IN Assize the Recognitors must first appear, but shall not be demanded until the Assize be arraigned per Curiam. The Assize was for the Office of Clerk del Treasury and Warrants & Keeper of the Writs & Records of the Court of B.R. which was time out of mind used and approved. The Chief Justice of B.R. for the time being had a Grant with all Fees, Profits &c. appertaining to any one person or two persons for term of their Lives and the Life of the Survivor of them, and that B.R. is an Ancient Court and the Office an Ancient Office per Custom grantable at the pleasure of the Ch. J. to any one or two persons, &c. Allen for the Plaintiff Arraign l'Assize: Stroud senior for the Def. demanded Oyer of the Writ. which was read, and also of the Return of it, and this also was read; then he prayed that the Recognitors be demanded, which by Foster Ch. J. is an admittance of the Writ to be good, and therefore as on the view Grant they had per Curiam a Special Imparlance; for the abatement of the former Writ is not their faults, and this is for the advantage of the Demandant that he should not be prejudiced by preposterous pleading. Adjornatur. (6) Assize.

Sir Rich. Temples Case.

SErjeant Maynard moved (that he being Elect Burgess for the Parliament that is to sit) after the time of Tryal prefixe and returned, may have his Prejudice on Affidavit, which the Court would not allow now, if he were Arrest before the Parliament, he should not be delivered by them, but by the Parliament only, and therefore nothing was done. Also per Curiam the very Indenture of Return must be the ground for the Court to proceed in this Motion or a Writ out of the Chancery. And by Maynard the Priviledg goeth 20 days before the Sessions of Parliament; ad quod non fuit responsum. (7) Priviledge. Siderf. 42. Pl.

May 2. Keech *versus* Potts.

SIr Ed. Turner Attorney of the Duke of York moved against Prohibition to the Court of Admiralty, because the Sentence by the Assent of the Parties is there given 8 years agon, but notwithstanding this, Foster Ch. J. and Twisden held, That the Court ought, ex debito Justitiæ, to grant the Prohi- (8) Prohibition.

hibition where it appears to the Court, as here, that they have no Jurisdiction, notwithstanding Judgment thereigiven, if Execution be not actually done, which was agreed and Prohibition awarded Nisi.

The Inhabitants of *Bromely* and East-Marsh at *Blackwall*.

(9) Sewers. Johnson moved to quash an Order of the Commissioners of Sewers of Bromely-Marsh, because made on a bare suggestion of one of the Commissioners. 2. None of the Quorum are mentioned. 3. It is not alledged that the Defendants are chargeable: and Tourner to the same Effect, that the Order is Felo de se, because it is said, That if J. S. only shall repair, he shall have x. li. allowed to him in respect of 80. that he hath expended. Wild Serjant contra, That the Order is good, and this Suggestion is but a Complaint which may be made by any, and if a private Man makes it of his own head, yet the Commissioners may allow his Expence; and though J. S. ought to repair, yet he was not bound to make it so ample; also Bromely would have a profit by it (and Twisden agreed, that Contribution shall be made by him that hath any manifest benefit, but this must be on Presentment of the Jury) and although any six may make a Presentment as well upon their own view, as when by a Jury, yet here the persons appointed shall not make it. Also by Tourner this is done by the Commissioners after that J. S. of his own head hath repaired the Breach, yet per Curiam the Danger being apparent and of necessity to be amended. As a House may be pulled down on danger of Fire, and the Order recited this, and the benefit of the Marshes thereby: Wherefore respit the award until view of a Copy of the Order. Windham Justice said, that the Commissioners of Sewers shall have as much Favour as may be, and they would not quash it.

(10) Certiorari. All the Court refused to grant a Certiorari without special Cause to remove Judgment given of Felony in Inferiour Court being but for delay.

(11) Tryals. Nota. The Court will not award new Tryals on the Jurors gainsaying their Verdicts, unless the Judge before whom it was, conceived the Verdict to be given against the Evidence per Curiam.

Horn

Horn *verſus* Quaſh.

STroud Junior moved in Arreſt of Judgment in Action upon the Caſe on Promiſe becauſe it is to pay Arrearages on account of Money of the Defendant and this on the Plaintiffs own ſhewing, but per Curiam this ſhall be intended after Verdict due to the Plaintiff, and that it is the Defendants only in Cuſtody. 2. Defendant pleaded Non Aſſumpſit & ponit ſe ſuper patriam & predict the Defendant ſimiliter this per Curiam ſhall be amend. (12) Amendment. Hetley 119.

Bernard *againſt* Ewen.

IN Debt on 2 Ed. 6. for not ſetting out Tythes, the Defendant as 2 Cr. 137. Hub. 170. pleaded Agreement parol for the Tythes with the Parſon as long as he ſhall be Parſon, this is good only for a Year, though it be with the Party who is a Pariſhioner. But in Iſſue on this Agreement after Verdict no Repleader ſhall be, no more than in Iſſue on payment on ſingle Bill, which in it ſelf is not good: per Windham Juſtice, to which the Court accords: But Twiſden ſaid, If the Iſſue on payment on ſingle Bill be found for the Defendant, its doubtful if a Repleader be not to be awarded: And he doubted whether the Grantee cannot agree with the Grantor of Rent that he may retain his Rent for ſeveral years, which Powis who moved for Repleader conceived could not be good. Sed adjournatur. (13) Agreement. Hetley 107. 2 Cr. 613. Leonard 128. pl. 17. 2 Leon. 29 pl. 32. 2 Brownl 11 pl. 10. Godbolt 333. pl. 426. Latch. 176. Perkins 14 pl. 62. 37. 2 Co. 360 pl. 21. 3 Bulſtr. 154 pl. 64. 2 Bulſtr. 265.

Stampts Caſe. Siderf. 40 pl. 4.

YOrkſhire Turner, on Dy. 109. oppoſed a Mandamus for the Office of Steward of a Court Baron and Leet, becauſe 'tis but a private Office, as a Pariſh Clerk, which Trin. 17 Car. 1 B.R. was denyed and therefore one ſhall not have this but only to be ſworn when he is elected. And in Trafords Caſe, Trin. 1655. for Uſher of a School in a College it was denied: Alſo the Steward of Court Baron hath Fee for the which he may have Aſſize. Wild Serj. There is none to whom the Writ can be directed. Twiſden Juſtice ſaid, That in Trafords Caſe it was expreſly adjudged, That a Mandamus would not lye for the Steward of a Court Baron ſole; but per Allen a Leet is alſo the Inheritance of a private Perſon, which he may grant as he pleaſeth: But by the Court, the Lord hath Inheritance only in the Profits, but the Office is publick for Execution of Juſtice. (14) Mandamus.

stice: Windham, The proper Remedy to remove a Steward of Court Baron is an Action upon the Case; for this is private, and he is not Judge there, but the Suitors, to which the Court accord. Foster Chief Justice, A Leet is derived of the Sheriffs Court which is publick, and the Mandamus is not for the Profits, but for the Place it self. Mallet, Steward of Copyhold Courts may administer Oath, yet for that alone a Mandamus shall not be granted; and it was denyed.

(15) Labourers. Nota. Justices of the Peace have Conusance of Apprentices bound by Indenture or otherwise, as well by private persons as by the Overseers of the Poor: But the Justices, per Curiam preter Twisden, may make provision weekly for them, as for Bastards as for the time past, but not for time future above weekly: Sed adjornatur.

May 3. Rawlins *against* . . . .

(16) Slandre. ACtion upon the Case for slanderous words: I will indict *R. Rawlins* at the next Sessions, and he shall lose his Estate, and it shall go hard with him to save his Life, but his Estate he shall surely lose for marking of my Sheep. Wild Serjeant moved in Arrest of Judgment after Verdict in Action upon the Case for these words, because that some part of them are not actionable. Jones for the Plaintiff, All the words together amount to a charge of Felony as well as if he had said, the Plaintiff had committed such an Offence for which he shall lose his Estate. Apres.

(17) Record. Apres Nota. Per Twisden, The Defend' in B. R. ought to bring in the Postea when it is come into the Office, but the Plaintiff is to bring it in to the Office and then give notice of it to the Defendant, quod Wild neg. the course is as Twisden said.

Knight

Knight *versus* Dancer. Ejectment.

IN Evidence to a Jury it was observed, that temporal Pos- (18)
session is given by Induction without taking of Esplees Seisin.
per Twisden and all. 2. The Ejectment was 20 Apr. the
Parliament began 25. and confirms the Possession until the
25. December; yet by the Court that is intended only as to
the Perception of Profits, quod Maynard pro Def. neg. and
by them they that are in void Livings shall be adjudged In-
cumbents ab initio, but not where there is a Title in being,
then it shall be only as to the Profits. Twisden, If the E- Relation.
jectment had been after the Parliament and before the 25. of
December, there the Defendant may plead Not guilty; but
being begun before the Parliament, there is only a cessat exe-
cutio by the Act till the 25. of December. But 3. Maynard Verdict.
moved for a Special Verdict, and the Court said, That they
could not deny it to the Kings Serjeant. Also he said, That
Damages must be paid unto the time of the Ejectment, which Damages.
shall be contrary to the intent of the Act, sed curia e contra.
4. Nota per Twisden, Original Record must be brought in by Officer.
the Clerk himself, but a Copy may be brought in by any one.
5. The Title being to a Rectory by Dr. Griffith Lessor of the Recusancy.
Plaintiff by a Presentation of the Earl of Shrewsbury who
(as was proved by the Roll of Estreats of the Clerk of Assize
signed by the Judge and delivered into the Pipe, and thereupon
an Inquisition and Process made) was a Recusant at that
time; and this was allowed for good Evidence, the very Re-
cord of the Assizes at that time when the Earl was found a
Recusant being burnt in the Temple, after in 1649. which
was proved by Mr. Ceely Keeper of them as Associate to the
Clerk of Assize, but he residing on the nisi prius side, was not
required to answer to the particular Time when this Recusan-
cy was found. 6. Primer Possession (though it will not make §. 8.
a Plenerty, as Greens Case and Sir H. Gaudyes Case Hub.
302. against the true Patron yet) though it be void, and the 2 Cr. 256. 2 M. 96. pl. 159.
Collation to it also as to him, yet it shall be good against any
Stranger who hath no Title; but this point being also waved,
7. fuit insist that the Plaintiff having no Title, the Defen-
dant is confirmed in by the Act of 12 Car. 2. but the main point
insisted on was the Conviction of the Earl of Shrewsbury,
which Wild Serjeant pro Plaintiff urged was not full upon 3
Months between the 1. April and the 6. of September and time
for two Proclamations. 2. One of the Estreat Rolls was
crossed of the like Conviction as aforesaid, and was the Ori-
ginal

ginal of the Estreats, the other being but a Certificate thereof by the Judge (but both were signed by the Judge) which was warrant for the Clerk of the Pipe to proceed; and both Rolls are delivered into the Exchequer upon the Oath of the Clerk of Assizes, but the Rolls are (that Plaint. for 3 Months following 1 Apr. 17 Car. 1. (that Croft. for 3 Months apres 1 November the same Year, whereas the Conviction was 17 Car. 1. en September: But per Maynard, There being a Conviction that shall remain till it be reversed by Conformity, which Finch Sol. al. R. admits as to the King, but as to any other person
§. 6. it ought to be good, or at least, not void. 8. It was agreed per Curiam and Maynard that summed up the Evidence of the Defend. that the Act 12 Car. 2. takes away any Primer Possession
1 Cr. 504. without Title. Also that the Recusant cannot avoid Conviction (de facto only) until Conformity. Wind. If one be indicted for Recusancy 1 April and convicted 6 September, that may be good quod curia neg. for the Indictment must be for three Months absence, which is not here; if it be otherwise, the Recusant may avoid it; And per Twisd. and the Court he may do it before Conformity by the Statute, but not against the K. As Finch aforesaid: Allen pro Defend. The Conviction may be by Appearance and Confession or otherwise, as well as upon Proclamation quod curia concessit. Also per Powis pro Defendant, The Conviction, if the Recusant conform not, shall have Relation to the Indictment. And per Maynard pro Defendant, The Certificate of Estreat is in July 18 Car. 1. for three Months before the Conviction, at that Assizes, which per
Relation. Curiam relates to 17 Car. 1. Contra Maynard, who said, That the Certificate relates only to the Time of the making of it, being unde convictus est, which might be at any time before. Yet per Finch pro Plaintiff le Certificat is coram Justiciariis pred. which shall be intended at the same Assizes. Also
Presentation. although the Recusant himself cannot avoid it, yet the Persons claiming under him may avoid any Title made against him but his own Recusancy. Sir Jeoffrey Palmer the Kings Attorney said pro Plaintiff, That Presentation by a Recusant is Presentation de facto to make a Plenerty, as Chancellour
Evidence. d' Oxfords Case. Twisden, That which is certified in the Exchequer by the Clerk is only wanting of the Record, but in Evidence the Jury may be satisfied that there is a Record by other proof; but how two Certificates of Estreats should come in he knew not: The Jury upon the whole was directed to find whether the Earl was convicted or not per Curiam Seriatim, and refer the rest to the discretion of the Court. The Jury found the Earl a Recusant convict.

May 4.

May 4. Titerton *verſus* Buxton: Treſpaſs.

DDefendant juſtifie becauſe of Common Ratione Meſſua, gii, which Wilmot for the Plaintiff ſaid was not good: Adjournatur. (19) Common.

Johnſon *againſt* Samworth.

ACtion ſur Ca. upon a promiſe in conſideration that J. would pay to C. upon the Inſtance of the Def. that then if the Defendant ſhould afterwards play at any Game, he would give the Plaintiff 40 l. the Plaintiff alledged generally that the Defendant did play for Wine at a Game call'd Par & Impar; the Jury found pro Plaintiff, Monday move en Arreſt de Judgment: Adjornatur. (20) Aſſumpſit.

Thomas Howard. 30 pl. 53.

HE brought in the Kings Pardon being after Attainder of Murder, which ſuggeſted, that upon the Tryal there was no Evidence to prove it to be of Malice fore-thought, and that the Wound was not given by him but by another fled: Alſo that the Coroner found it but Manſlaughter, and the Indictment, Trial and Removal were recited in it: Alſo it was a Pardon of 3. joyntly and ſeverally by particular Name, but not having a Special Writ of Allowance (although the Non-obſtante was that it ſhould be allowed, explained, &c. in all Courts, yet) per Curiam without a Special Command, the continual Practice of this Court hath been not to allow it without a Special Writ. And Mallet ſaid, This is ſufficient for the Priſoner but not for the Court. And per Twiſden, That Statute that ſaith ſuch an Act ſhall be allowed, that muſt be intended according to Law; and the Practice of the Court was affirmed by all the Councel at the Bar: but on Morgan & Egertons Caſe le Court agree, That the King may pardon Murder per non obſtante without ſpecial words (de murdris) which this wanted) notwithſtanding the Statute and Stiles 377. pl. 819. e contrà. (21) Siderf. 41 pl. 7. Ch. de Pardon Br. 10. Noy 31 pl. 125. De Pardon Br. 42. Cr. 814 pl. 2. 80 of Felonies, &c. 1 Ed. 3. 17 pl. 5. Moor 752. pl. 1033. 9 Ed. 4. 26. b. pl. 35. per Billing. Com. 502. Bar.

Weden *againſt* Baldwin, &c.

IN Ejectment Special Verdict on not guilty, find that J. B. and his Wife, and the Heirs of the Baron was ſeized of Lands Capite, and J. B. was ſeized of the Soccage Lands in (22) Deviſe. Siderf. 55 pl. 23.

Question, and devised to his Wife the Remainder to H. B. in Fee, &c. P. wis for the Plaintiff. The case is only Lands in Capite are granted to Baron and Fem for Life, the Remainder to him in Fee; and he being seized of other Lands Soc- devised the whole, which he conceived good. 1. Because the Husband dyed not Tenant to the King nor had any thing in Capite at the time of his death: For he dyed seized in Fee only of a Bare Remainder expectant upon the Life of the Wife, 2 Co. 60, 61. for which he shall not pay any Heriot, 24 Ed. 3. Heriot, F. 3. 5. Dy. 237. The Wife being sole Tenant, and therefore, 2. This Remainder will not hinder his Demise of this Land, 9 Co. 96. 139. b. 134. b. Soccage, 2 Co. 92, 93. Such an Heir shall not be in Ward, 32 H. 8. cap. 1. This is the Reason of the expres's proviso in the Statute, because it was not so at C. Law: But the Stat. 34 H. 8. explanatory 10 Co. 81. of a Remainder, must be intended of a Remainder that is immediate to the particular Estate as a Reversion but not other: 7 Ed. 3. 51. b. pl. 29. neither was at C. Law. Mr. Howel pro Defendant was not ready, which J. Twisden rebuked, because it was in a Concilium of the last Term, and it is not expected that one should answer the Objections of the other at the same time, but only shew their own Judgments and leave the rest till afterwards. Also he said, That it is alledged that J. B. was seized of certain Lands in Capite, and doth not in all the Verdict say how much, which is uncertain, and not helped by any Special Conclusion in the Verdict: And if there be not two parts descended, this can never come in question; Special Conclusions will only help the Faults of amendments of Lives or matters of Form, which the Court agreed: Adjornatur. Post.

Moor 837 pl. 1130. Dy. 172. b. pl. 12

Councel.

Cooker *against* Gardner.

(23) Prohibition. PRohibition to the great Sessions at Mongomery on Suggestion put in writing, That the Matter was without Equity and only tryable at Common Law. And this although that Court should admit their Jurisdiction, is sufficient for a Prohibition per Curiam, but it appearing they had Cognizance, it was denyed. Post.

Chambers apres. 62 pl. 97.

(24) Prohibition. ALlen moved for a Prohibition to the Admiralty notwithstanding an Appeal to the Commissioners Delegates, and Sentence in that Appeal in 1653. confirmed by Parliament.

Charle-

Charleton shewed cause against it, but the Court would give no Rule without the Suggestion put in writing and answered to, but conceived that as the case is, that Prohibition will not be granted pending the Appeal (though a Supersedeas to the Admiral Jurisdiction) and so there was no Sentence there at the time of the Act. Yet by Twisden, that is Quoad Executionem only; but the Act is general of all Proceedings, &c. that they shall be confirmed: Goldsb. 119. pl. 4.

Bradford *against* Bloodworth.

IN Ejectment Special Verdict find that Sir J. Harison being seized, became a Bankrupt; and in 44, and 45, and 46, and 49, at the Sute of three several persons was Utlawed: and in 48 Sir J.H. sold to the Lessor of the Plaintiff bona fide, and the Jury have not found him that he was utlawed in 45 in fraudem Creditorum, and to that intent; which by Wild Serj. pro Pl. is necessary, for otherwise a man shall not be a Bankrupt. Also the parties ought to have notice of his Utlawry: Also admitting both times 43, and 46, the last whereof is 7 years before the suing out of the Commission, which was not till 1653. (25) Bankrupt.

Neud. for Defendant, That the Bankrupt Sir J. H. is within this Act 21 Jac. 5. For the Sale by Sir J. Harison in 48, was within 5 years, which is sufficient to bring him within it. 13 Eliz. c. 4. The Estate of persons in Debt to the King, is subject from the time of the Debt due, which is like to the Stat. of 21 Jac. 2 Co. 55. 26. F. N. B. 150. Q. The second Reason is, That the Creditors Title is sign to the Purchasers, and are first provided for by all the Laws of Bankrupts being, Com. 59. 1 Co. 131. for advancement of Trade and shall be beneficially taken. 3. It is in the Creditors Election, as the case is, to take out a Commission when they will, for the proviso being to take off the benefit of former Laws, is like the Stat. of Limitations, which shall be so: As 4 H. 7. (Com. 379. 3 Co. 79) of Entry. It may be within 5 years after. And Sir John Lakes Case C. B. 4 Ca. 1. in Battery of his Servant the Plaintiff shall recover for any Battery within 6 years before the Action and so. 1 Cr. 139. A 4th. Reason, This Stat. being to bar Rights, are like distinctive Conditions, 8 Co. 90. which shall be taken strictly: And so if the Bankrupt sell his Lands within the 5 years, that shall save the Creditors to 5 years after; else the soonest Bankrupt is in the best condition, which is an Inconvenience: For he might as well have purchased a Day after he became a Bankrupt, 1 Cr. 49. A 5th. Reason: The Stat. of Bankrupt by expres pro-

viso are to be construed beneficially, 1 Cr. 568. And though the first Act of a Bankrupt doth intitle the Creditors yet, they are only bound by 5 years after notice of such Act. Nor doth the Purchaser incur any other hazard than he that buyeth a defective Title: But the Creditors can have no other Remedy than this for their Money. Mich. 1655. in C. B. Rot. 484. Jellif *versus* Horn. A Glazier Copyholder in Fee 10 May 1643, became a Bankrupt, and in 49 became a Bankrupt again, and in 52 he doth sell on a Commission in 51, which was 10 years after the first cause of Bankruptcie; after Argument at Bar & Bench adjudged for the Creditors, that they had a good Title against the Purchasers. Per Curiam, The proviso is express, that the Commission must be sued within 5 years after some time when he became a Bankrupt; and his being so after the sale, that will not hinder, that if the Commission be not sued within 5 years of his becoming a Bankrupt, & then they can only defeat all Sales made within the 5 years, but not afterwards: And upon this ground was the Judgment aforesaid in the C.B. For that point was, Whether if a Man continue Bankrupt 20 years, he is always lyable or no, which was adjudged for the Plaintiff by all the Court. Nisi, &c.

1 Brownl 34.

(26) Reference. Nota. While the Pleadings are in Paper, one may have Reference to the Clerk Secondary, on a suggestion, that he will pay whatever is due; but after Judgment nothing will be staid upon such Motion.

May 6.

(27) Error. Br. 55. Stiles 105 pl. 218. 8 Ed. 3. 38 pl. 29 Godbolt. 439. pl. 505. Nota. If the Roll be marked for a Writ of Error before Execution done, the Sheriff shall be excused for doing it before a Supersedeas delivered; but this is sufficient to supersede the Execution, per Twisden & Curiam.

Negus *against* Reynal. Ejectment.

(28) Monstr. IN Evidence to a Jury it was observed, 1. That a proof that there was a Revocation is sufficient for the Heir without the producing the Deed it self, which was taken away by the Defendant himself. 2. A Lease recited in a Release was admitted to be proved by the Witnesses to the Release without shewing the Lease it self, which was imbesild by Herbert Lessor of the Plaintiff. 3. Bargain and Sale not mentioning any Money paid for consideration, may be helpt by Averment, that Money was paid, per Curiam. 4. The Lands in question were

Averment.

in

in the Premisses and Habend' of the Deed, but not in the Limitation of Uses, and yet good, being parcel of the Manor.

Clement *against* . . . .

MAynard moved that Baily should bring in his Bond because (by Twisd') Action upon the Case lyeth not against him for a false Return but the Court said he should not be compelled to assign his Bond without sufficient Surety given him. (29) Retorn vic. In Dett F. 80. Simile p. 8. Supra.

Heath *versus* Paget. Ante 3 pl. 6. Syder. 40.

THe Defendant pleads, That pending the Assize the Plaintiff took upon him the Order of Kt. of the Bath, to which the Plaintiff demurred. Finch for the Defendant cited Sir Simon Bennets Case 3 Car. 1. 1. That a Baronet is a Dignity, and though not in the Stat. yet if it had, it is not within the Word Knight. Twisden: Kt. of the Bath shall not have 2 Chaplains within the Stat. Windham; Baronet is by Patent. But Portmans Ca. 1 Ed. 6. 7 Co. 27. cited by Finch, is express, That this being the Parties own Act, shall abate his Writ: But whether Knight of the Bath shall be included within the general word Knight, is the Question. Twisden, The Law takes notice of Kts. Batchelors, Bannerets, (not of Baronets) of the Garter, and of the Bath: Et adjornatur. Post. (30) Abatement. Thelw' Digest. 326.

Sir Rich. Temple. Ante 3 pl. 7.

HE brought in a Writ of the Chancery (to allow his Priviledge of a Member Elect for the Parliament) Direct omnibus Justiciariis, which, per Curiam, shall be intended of the Justices of Peace, and therefore they refuse to open it or read it. Post. (31) Priviledge.

Tuttle *against* Porter.

TRespass for cutting and carrying away, which the Jury find and give intire Damages, but say nothing of the pedibus ambulando, which by Allen for the Defendant is a Verdict for the Corn only, whereof the Plaintiff and Defendant were Tenants in Common, and so it was to be divided; and the Jury have not distinguished the Parcels. Pepis for the (32) Damages.

the Plaintiff, That pedibus ambulando shall be intended, which Curia dubitavit, Adjornatur.

Green *against* Green.

(33) Slandre. 1 Cr. 25. r. YOu are a Rogue, a Rascal, you are a Papist Dog, and you said, you would kill the King; Damages 150 l. against the Defendant a Madman: And yet per Curiam this is Treason notwithstanding the Opinion of Coke 3 Inst. 14. that Words are not Treason; and therefore they would give Judgment, unless the Judge of Assize before whom the Trial was, will certifie that the Dammages were excessive. Post.

(34) Amendment. In Ejectment where the Title is material the Plaintiff amended his Declaration after Plea (but while all was in Paper) in the Date of his Action, without Costs paying.

(35) Supersedeas. If the Records be not removed in reasonable time (though Error be brought) yet the Inferiour Court may proceed, per Curiam.

Clares Case.

(36) Mamdamus. SYmson moved for Mandamus to restore a Fellow of Clarehal and had it Nisi (& Jones for the College in Witheringtons Case waved the day that he had to shew cause, because he intended to make a Return, otherwise it had not been granted until the Case ended.

(37) Demise. H. demised Legacy to be taken out of the Issues and Profits of the Land, Trees, Wood and Timber, and after made his Wife Executrix, and after demiseth his Lands, Issues, and Profits to her for the Payment of his Debts, &c. (without naming the Wood, Trees, &c.) yet good per Curiam: And the Profits of all shall be to the same purpose, and not left to descend to the Heir. As if Land be demised for payment of Debts, the Executors may sell, though Authority be not specially given them, but otherways if such device had been for Legacies only, or for raising Portions, &c. there had been no Remedy but in Chancery against the Heir.

Ball *against* Blackmore.

(38) Prohibition. RIchardson moved for Prohibition to the Admiralty, shewing the Libel by which it appeared that the Cause was intra fluxum & refluxum maris, of which (Quære if they have Cognizance)

nizance) and it was granted nisi causa, &c. 1 Leonard 270. pl. 363.

Siclemores Case.

THe King assigns Error of an Indictment after Demurrer and Removal by direction of the Court, now after Reversal he shall be tryed de novo: And so it is if the King had demurred, and this Error after the Act of Oblivion which pardons the first Utlawry and Fact; but this notwithstanding the Court awarded a Tryal if the Judgment be reversed. Post. (42) Error.

May 7. Garrard *against* Lister. Ejectment.

IN Evidence to a Jury at the Bar. Twisden, The Lord after acceptance of Rent cannot enter upon the Lessee of a Copyholder. 2. The Lord leaseth the Freehold of a Copyhold to J. S. per Curiam this is good betwixt J. S. and the Lord. 3. The Lord may be admitted to give Evidence for the Lessee or Copyholder, though the Court would have spared him had there been other. But it is strange, by Windham, that the Lord should reserve a Rent upon such a Lease (though it may be intended for the Copyholders benefit) and the Court agreed it could not. 4. That a Copy of the Act of the Court is enough to prove a Man Administrator, for there is only a Commission goeth out to swear the Party, but no particular Authority, by Twisden & Curiam; but yet such Copy ought to recite the Authority of the Court or Persons that give it: And unless the Authority be good and allowed, such Copy shall not be read (which of it self by Foster is a kind of allowance) and this upon the doubt of a Grant by Dr. Ayloff. 5. On Cromwell & Giles Case: I thank my Husband he hath done kindly by me in giving me this Land and my Son after me. This was a good Assent by fem Executrix to take as Demisee: And by Windham, The not bringing a Writ of Dower may be taken for an Assent after her death. Also if she saith that the Heirs (for whom Lands are devised in trust) shall have them undivided, it is a good Assent. Southwards Case, That after the death of my Wife the Land goeth to the Holloways, adjudged a good Assent by the Husband of Holloway, Executor to a Devise to Holloway and the Heirs of the Testator. The principal case was H. devised to his Wife for Life in lieu of her Dower, and after her decease to two in trust for J. D. during Life, and after of the Male Heirs of the Testators eldest Son, this being of a Term after the death of the Trustees, (43) Forfeiture. Latch. 227. L. Co 47.a. Leonard. 102. Pl. 135. Copy. Assent. 1 Brownl. 132 Pl. 488. 9 Co. 52.b.

stees, by Windham, shall go to the Heirs of the Testator. But for the length and intricacy of the Case, the Court directed a Special Verdict, 6. Devise of a Term to one for Life, the Remainder to the first Issue Male by Windham & Curiam is void to the Issue, and the Executors of the Tenant for Life shall have it; and they all agreed not to exceed Mannings Case. One Title. Child & Baylies Case, 2 Cr. and Jenkins & Gibbons Case in the Exchequer 1655. Devise to T. for Life and to his Heirs Males for so many years as they should live, this adjudged no descriptions of the Persons capable, but an absolute Void Devise. Wind. auxi cited 1 Bulstr. Rep.

Devise. Br.

Sir Rich. Temple. Ante 13 pl. 31.

(44) Fine. Leonard. 72. pl. 9.

HE had told several of the Jury that they needed not appear, for he would insist upon his Priviledge, which the Court held a great Misdemeanor, the Jury failing by reason of it: And by Finch Councel for Sir R. it was an abuse of his Priviledge of Parliament Man; and though the Court would not tax Costs presently (which would have been to fine him indirectly) yet they ordered, That upon the Tryal he should pay them if the Tryal went against, or allow them if the Verdict went for him.

Hinksie *against* Bently.

(45) Variance.

ON nul tiel Record plead in Sc. fa. Allen for the Defend.' alledged Variance, because the Record is Esq; and the Sc. fa. but Gentleman, 25 Ed. 3. 39 pl. 6. by Foster Ch. Just. cited, thinking the Record had been Gentleman and the Sc. fa. Esq; And the Party had lost nothing of his first addition. And by Windham, Neither of these are parcel of the Name, and therefore no Variance. Sed adjornatur.

Bowden *against* Warren.

(46) Amendment.

DEfendant in consideration that he had received 43 l. promised, that if the Plaintiffs Testator be evicted by Chelswell, then he would pay, &c. to Bowden the Testator. And it was said that after his death, viz. 1660. which was before C. was evict, which was moved by Baldwin in arrest of Judgment. but Curia contrà, for the viz. is void, as if by Twisden H. declared in Ejectment of Seisin 1 May 1650. and that after viz. 1 May 1600. the Defendant ejecit, which is impossible, and therefore immaterial being after Issue as well as if there had been

been no time laid for the Eviction, which is but form, and to be demurred to; and therefore Judgment for the Plaintiff.

Rawlins *against* . . . Ante 6 pl. 16.

J. H. shall lose his Life for marking my Sheep; Twisden cited the Case, Thou art a Bastard, and a Whore, and that will be proved by a pair of Sheirs and Sive. adj. act. but per Curiam, here is no mention of stealing: also That J. S. was indicted, and it will go hard with him for his life, adj. not actionable. And so in this Case, adj. not Actionable. (47) Slandre.

against Reynald.

Upon the Act of God hinding a Tryal or any Circumvention apparent in it, the Court, ex debito, and not of Favour only, will grant a new one, per Curiam. (48) Tryal.

Booth *against* Beard.

After Record removed by Error the Amendment if any be must be where the Record is. (49) Amendment.

Nota. The Lessor of the Plaintiff by several Rules of Court on demand, ought to pay Costs upon the insufficiency or sculking of the Plaintiff. In Ejectment. (50) Costs.

May 9. The King *against* Reading.

IN an Indictment for Murder, the Court refused to admit Proof of a Copy of an Order of the Commissioners of Sewers (under which the Prisoner claimed benefit) upon Oath, but read it upon the bare affirmation of the Witnesses that it was a true Copy. 2. The Prisoner was said to murder J. S. under colour of Authority, which by Twisden and Foster was not to be confirmed by the Act, but to make an Act Murder only by reason the Authority is afterward made void is unreasonable, to which the others agreed. 3. Though a Wound may be cured, yet if the party dyeth thereof, it's Murder; and if the Act be unlawful, it matters not who gave the first Blow. 4. Though the Commissioners of Sewers had err'd in their Authority, yet, by Twisden, this will not make it Murder. Quære; The Court agreed if the intent of the party were to do a Lawful Act. Post. (51) Serement. Coroner. 1 Cr. 365.

Heath *against* Goddington.

(49) AFter Judgment against the Principal the Plaintiff brought Debt against the Bail on Recognizance (after the course of the C. B. and so the party shall have time to bring in the body only by the Return of the Laticat, whereas otherwise they are not bound to render the Body till the second Sc. fa. And if the Party be dead before, then the Bail is not forfeited; and the Reason of the C. B. is, because the Bail is of a Sum certain, but in R. R. here it is to pay whatsoever the Principal shall lose uncertainly: And this hath been the course of the Court, by Foster, for 40 year, but the Court doubted if Debt lye upon the Recognizance at all: & adjornatur, to search Presidents. Post.

Bye *against* Woodman. Rol. 255.

(50) Covenant. IN Trover and Conversion, Winnington moved in Arrest of Judgment, because the Plaintiff saith, that he is one of the Attorneys Curiæ Domini Regis in the said Court to hold Pleas before the King, which by him is not the Office of an Attorney; but per Curiam this is applicable to the Stile of the Court only and not to him: Judgment pro querente.

Rich *against* Hall. Trespass.

(51) Damages. IN Evidence to a Jury it was observed, 1. The Trespass being for Fishing and cutting 2 Acres of Oziers, which being several Damages, ought to be so, per Curiam. 2. H. leased a River and the Land on both sides, yet per Curiam, the right to fish also remains in the Lord, as of a Common High-way, Warren, &c. And though he had granted the sole Fishing, yet where the Grantees Land lyeth not on both sides, he cannot prescribe for it probably, though it be not impossible that he that hath Land on both sides, may not have any Fishing. 3. The Proof for the Plaintiff Tenant of the Manor was by a Court-Leet-Book by Presentment of the Homage, not per Juratores of any certain place; & so it was supplyed by Witnesses. 4. Trespass lyeth not by one Tenant in Com. against another, nor for a several Fishing. 5. Presentment without Execution of it by levying the Assessment, is no Evidence. 6. The Verdict being only of Fact is properly the Juries, and not void tho contrary to directions of the Court, but if any matter of Law be directed of that, the Court may remove a Jury, and they find it in pain of Attaint.

Trespass. 2 Leonard. 148. pl. 18. 1 Brownl. 42. pl. 216.

Attaint. 7. Though a Man may accept Parcel by Copy, yet he may give Evidence for more, because the rest is not thereby destroyed, per Curiam, if it be by Prescription.

Heath *against* Paget. Ante 13 pl. 30.

(52) Abatement.

Windham: Knights of Malta were Knighted by their Abbots with Dirons, not with the Sword as H. Kt. of the Bath is. But by Twisden, as the Stat. de scandalis Magn. mentions not any Marquess or Vicount, but inferiour Degrees, yet being made for Execution of Justice, extends to them by Equity; so this being made for speed of Justice, shall be taken by Equity. And by Foster: Knight is the genus, of which these are all Species: And therefore 14 Ed. 3. 25. Pl. 14. The Name continueth, and so, per Curiam, the Writ shall not abate, vid. Sir Simon Benets Case, which is positive. 2. No other plea to the Writ may be but as amicus Curiæ; for though this be to the Person, yet it is pleaded to the Writ, and therefore not a bare Plea in disability of the Person. Post. 1 Cr. 104.

Bastard.

(53) Slandre.

Mr. B. did lye with J. P. as often and familiar as with his own Wife, without special Damnification, the Judgment stayed usq; &c.

Howards Case. Ante.

(54) Pardon. 13 Pl. 20. Charter de Pardon Br. 10. So is 27 Ed. 3. c. 2. Pardon §. 2. Com. 455.

He now prayed the allowance of his Pardon, and brought in his Writ for that purpose on 10 Ed. 3. cap. 2. which only mentioned Homicidia, &c. with a Non obstante to the Statute. And by Twisden, The Pardon is different from all Presidents, and is upon false Informations, whereas he should have put in his Merit as an Inducement to it, & curia advisare vult. And Twisden said, That a Sc. fa. may be brought 7 years hence, and repeal it upon disproving the Suggestions. Post.

Bushel *against* Bland.

(55) Error.

In Assumpsit after Verdict, if the Plaintiff would deliver to the Defendant in Jan. 1642. in Figures is helped; by Jones, being in Inferiour Court by Stat of Jeoffails. Windham, The Place is material after Verdict. And per Curiam, The Time is also necessary, and ought to be in Latine according to

the Stat. and being in Figures, is insensible: and Judgment reverst.

The King *against* Halse.

(56) Retorn.

ON Mandamus to restore H. to the Place of Steward of the Corporation of Torrington: Baldwin excepted against the Retorn; 1. Because it is said they are a Corporation according to a Charter of a long time granted, and do not shew what manner of Corporation they are, or what Authority they have. Twisden, They are admitted to be a Corporation by the bringing of the Writ, which the Court agreed; and that it is enough for them to set forth how he was chosen and removed; and upon a Retorn an Action upon the Case lyeth against them by the Name in the Writ.

Fane *against* Minshaw.

In Bar & Fem. Br.29.

(57) Debt. L. Co.112.b. 4 Co.51. Ognels Case. 1 Anders.47.pl. 120.7 Ed.45.b. pl. 16. 10 H.6. 11 pl. 38. It lyeth against him. 47 Ed.3.23.b. Dett Br.44. In Debet & Detinet against Husband for the arearum sola. So 5 Co.36. Walcot. 5 Co.10. Hensteds Case,&c.

DEbt on Lease to Fem sole for Arrears during Coverture was brought against the Husband after the death of the Fem. Wild for the Defendant, The Executors of the Husband shall not be chargeable, and therefore not the Husband no more than Debt upon a Bond. Allen for the Plaintiff on Chamberlains Rep. Debt on Lease might have been brought against the Husband sole in the Life of the Wife, because during the Coverture he is Assignee in Law, and receives the Profits, and therefore it is but reasonable he should be charged. So F.N.B. Debt 121.c. Of this Opinion were all the Court: And Windham cited 3 H.7. That the Husband alone may bring Debt upon a real Covenant made to the Fem dum sola fuit, and broken during the Coverture. Also the Husband might have forfeited or assigned it. Post. 22 pl.63.

Whitwick *against* Osbaston.

(58) Action sur Stat.

DEbt for Words on the Act 12 Car.2. of Oblivion, averring that he was a Gentleman. And on 8 Ed. 4.7. Hyde moved in Arrest of Judgment, That the Plaintiff had not averred, that he is not within the Exceptions in the Act, as having a Hand in the Rebellion in Ireland. Twisd. Where such disabling Exceptions are in the Body of the Act, there, as Com. Stowel *versus* Souch, such Averment is necessary, but not so where such Exceptions, Leonard 76. Pl. 102. are only in the Proviso of an Act, which the Court agreed, and Judgment pro querente. Post.

. . . . . *against* Dakings.

INdebitatus Assumpsit for Rent reserved ought to be where the Land is, and not otherwhere though by consent. 1 Cr. 284. Post 46. pl. (59)

Barnard *against* Ewen. Suprà 7. pl. 13.

AN Agreement (for a modus decimandi) parol is good to excuse a Man from the Penalty of 2 Ed. 6. 13. of Tythes, and such an one whereupon an Action upon the Case may be grounded though it do not actually transfer the Interest of the Tythes; and it is the constant Custom in the Western Parts to plead such an Agreement in Bar against the Stat. And by Wind. An Agreement to hold for Life is a good Agreement, though without Livery it transfers not the Estate a fortiori, here for so long as the Defendant shall be Parson. (60) Agreement. Leonard. 23. pl. 29. 2 Leonard. 53. pl. 98.

. . . . . *against* Dikinson.

TRover for Stockings, and said not whether Womens or Mens, yet good: So for two pair of Bodies, also adj. good. Stiles 25. pl. 58. (61) Trover. 3 Cr. 837. pl. 10. Stiles. 25. pl. 58

May 31. Trowel *against* Castle.

IN Evidence to a Jury it was observed, 1. That by Custom of Woodstock Freehold Ancient demean as well as Copyhold passeth by Surrender and Copy, and shall descend to the youngest Son or Daughter. 2. Decree under the Exchequer Seal (which by Twisden is in the nature of a Judgment) yet though it recite the Bill and Answer, that is not sufficient Evidence. By Allen Council with the Plaintiff contra, by Foster Ch. Just. & Curiam. And by Twisden, Decretal Order under Seal, which recites all the Proceedings on Exemplification under the Great Seal hath been allowed to be read; but by Allen, not unless it have the Bill and Answer, which Windham agreed: But by Twisden, Where the Decree is produced only in Paper, then the Bill and Answer ought to be adjoyned, but not so when the Decree is under Seal: And in C. B. Stiffe *against* Stiffe, the Judges admitted a Decree to have been under Seal, and yet would not allow it without Bill and Answer. And by Allen, Its usual to disallow such Decrees, but an Exemplification of the Chancery, per Curiam, always (62) Custom. Record.

always recites the Bill and Answer. Moreton Serjeant said, he never did see the Seal of any Court denyed to be given in Evidence. 3. Custom that Fem shall not have Dower, and that 2 years value shall be paid for Fine by any Purchaser, and one by the Heir by descent in lieu of a Heriot and Relief, and that Surrender out of Court to three of the Freeholders may be good (but shall descend as at Common Law;) and ought to be presented within a year after. But by Wild Serjeant for the Def. The words of the Custom are not negative, nor do exclude but that a Feoffment may be made of it; which Allen who was for the Plaintiff, agreed. 4. Freehold as well as Copy may be Customary Lands; and being Ancient Dem. by Twisden, may pass by Feoffment as well as Surrender (though a Fine cannot be levied thereof, because a Writ of Covenant cannot be there brought.) 5. An Interlineation without any thing appearing against it) will be presumed to be at the time of the making of the Deed, and not after. And by consent the Jury had a Copy of Court Roll given by the Plaintiff in Evidence.

Custom.

Non est factum.

Agreement.

Ante 20 pl. 47. Fane *against* Minshaw. Bar. & Fem Br. 29.

(63) F. N. B. 121. C. That the Baron or his Executors, as 10 H. 6. 11. 4 Co. 49. and Underwoods Case B. R. 1641.) shall be charged in Debt for the Arrearages in time of the Coverture on Lease made to Fem dum sola fuit, after the death of the Fem, which the Court also agreed clearly. Mallet absente, and Judgment pro querente.

Debt. 3 Cr. 712. pl. 35.

Hill *against* Stern.

(64) Action upon Promise to pay for a Chamber, &c. 45 s. for every Quarter; The Plaintiff alledges that the Defendant enjoyed it from the 7 of September to the 7 of June following, by the space of seven Quarters. Baldwin moved for Judgment, the time being good without (per spatium) which the Court agreed. 2. It is an Action upon the Case for Rent of a House in M. and after Issue of nil debet, the Postea was mended and laid in Cursitors Alley, which ought not to be. Adjornatur.

Jeoffail.

(65) Nota. Though a Cause be entred up, yet if the Amendment do not much deface the Roll, it may be, and is usually in B. R. done, upon paying Costs or giving an Imparlance.

Amendment.

Cow

Cow *againſt* Shipwell.

DEbt on Judgment, wherein the Plaintiff declared of a Recovery in Doncaſter in the County of York in the Court of B. R. being then at Weſtminſter in the County of Middleſex, which by Lindly for the Plaintiff, is not material where the Court ſate, it being moveable at pleaſure. But by Wild for the Defendant, the Action is local, and ſo not to be in any County but Middleſex. Curia, It is not ſaid in Doncaſter, nor doth not ſay in the Court of Kings Bench then, and there being: therefore Judgment Arreſt, and the Court agreed, That plene Adminiſtravit is a good Plea in Debt on a Judgment. Poſt. (66) Lieu. So in Sc. fa. c. in a Q. incumbravit, that being Orig. needs not recite where B.R. was in Rec. in Q. imped. 12 Ed. 74. b. per Ric.

Sarjant *againſt* Madox.

IN Debt againſt Aſſignee for Rent, the Defendant pleaded Aſſignment of the Term before Rent Arrear by the Aſſignee by aſſent of the Plaintiff, the Plaintiff Traverſed the Aſſent, which by Allen is ill, this being againſt the Aſſignee, in whom only is realty of Contract, which is gone by Aſſignment and ſo his Aſſent not to purpoſe becauſe the Aſſent of the Plaintiff to the Aſſignee (the perſonal Contract being determined) is not material, and this might have been demurred to; or it appearing the Plaintiff hath no Title, the Defendant ſhall have Judgment; for though the Plaintiff hath not confeſſed the Aſſignment, yet he having let that ſlip and traverſed a Surpluſage, a Repleader ought to be: the Aſſignment being with Notice, but without Aſſent. Nota. (Replications per bene & verum eſt, are not uſual here as in C. B.) Alſo by Twiſden, On immaterial Iſſue the Court can give no Judgment, which Foſter Ch. J. and Windham agreed: If the Jury had found an Aſſent, that would have implyed an Aſſignment, but not ſo where it is found in the Negative. (67) Repleader.

H. juſtified Treſpaſs by Grant the 16 year of this King, which is impoſſible & qu non conceſſit, & Verdict for the Plaintiff; this was moved for a Repleader, adjornatur. But Windham conceived that it is as good as if no time had been alledged. Poſt. Repleader.

Nota. A Bill may be filed after the death of the Party on Error brought in before. (68) Error.

May 14.

May 14.

(69) Surrender. TItle to a Copyhold cannot be made by the Commission of Bankrupts without there be a Surrender or Admittance, 1 Cr. 569.

Heath *versus* Paget. Ante 13 pl. 30.

(70) Briefe. STroud Senior for the Defendant, That the Case remains at Common Law and not within the Stat. of 1 Ed. 6. c. 7. For 2 Inst. 594. At Common Law a Knight ought to be so named, and if made so pending the Writ 7 H. 6. 14. b. it shall abate, Dy. 55. 7 Co. 27. b. 6 Co. 10. b. though in a Quare Impedit, which the Court agreed. 2. That it is not within the Statute, (though within the general word Knight) because here is neither Suit nor Action pending by the Plaintiff at the time of his being a Knight, because that was after the Test and before the Return of the Original. 10 Ed. 4. 4. 9 H. 6. 19. 18 H. 8. 5. 2 Inst. 129. 6 Co. 47. Dy. 165. a. An Original purchased in the time of one King, cannot be returned in the time 7 Co. 30. a. of another: and the enacting Clauses of the Stat. del Demise le R. and of this are alike. Allen for the Defendant, The Return hath relation to the Test, and the Plea is put in after the Return: And it is said, That Post impetrationem Brevis, &c. which supposeth it to be pending, unless he had said also (and before the Return of the said Writ) which Twisden and Windham agreed; and though it be not within the express words, yet it is within the Equity of the Stat. as 560. Millingtons Case, of Pardons: Especially that Stat. being made for suppression of delay and in favour of Justice, and therefore will be construed most favourably, which Mallet agreed, Foster Ch. J. absente, and awarded, that sedente Curia, the Defendant should plead in chief. Post 72.

Thorn *against* Burton.

(71) Disseisin. Com. 349. b. 1 Cr. 304. IN Evidence to a Jury it was observed, 1. That Lessee of a Trustee is in by way of Trust, and that Lease of Cestuy que trust to T. is no Disseisin, only at the Election of the Trustee S. W. but it is a good Lease betwixt Lessor and Lessee at least, which cannot be determined without notice, by Windham, but it was directed to be specially found. 2. Claim within 5. years after the death of cestuy que vy when Lease was to commence, is necessary on Saffins Case: But by Glyn, the

the Fine being in pursuance of a Trust, cannot destroy any Lease made by cestuy que Trust, which Twisden, Foster, and the Court agreed. And though a Fine by cestuy que trust to his Lessee do not extinguish the Trust, yet it is not safe. Twisden, A Lease to the use of me and my Heirs is not altered by Fine to the same use, nor any Claim necessary. 3. When Men have two Titles, they shall be presumed in of the best, notwithstanding their Election, especially when such Entry is only to avoid a nonclaim. But by Windham, This Case is more proper for Chancery than this Court.

Heath *against* Paget. Ante 24 pl. 70.

(72) Monstr.

NEudigate for the Defendant, The Assize is of an Office the Plaint of a Grant without shewing it to the Court, which per Curiam is not necessary unless the Grant were by Deed: Whereupon he pleaded over, That the Plaintiff never had any such Seisin whereof he could be disseised: & adjornatur. Post.

May 15. . . . . *against* Opie.

(73) Satisfaction.

IN Evidence to a Jury it was said, That Payment of part to any Treasurer or Committee is no good satisfaction for the whole, and so not pardoned by the Act 12 Car. 2, 11. nor at Law, for it is payment after the day, but in Equity they may have benefit of it. 2. Affidavit, That the Defendant had paid or satisfied not saying how, is not good. 3. All Private Acts must be proved by the Rolls, but Publick Acts (though obsolete) may be allowed by the Court without a Copy proved.

Munisas *against* Baker.

(74) Surrender. Apres. He cannot distrein or have Debt before. Forfeiture.

IN Evidence to a Jury it was doubted if (upon a Custom to surrender to two Copyholders out of Court) a Surrender to the Heirs of a Copyholder before admittance were good: Twisden conceived it was, Foster and Windham absent 2. The not appearing at a Court being a Forfeiture, a Copyholder said, If it were a Court, he would appear; if none, he would not. Though this appear to be a Court, this is no Forfeiture, because no wilful Contempt, By Twisden. And so where a Copyholder hath License to fell (though it were repeald by the Grant of the Lord of his Interest before the felling) yet this is no Forfeiture though the License be determined by it. 3. Whether a Lessee for Years may grant a License to a Copy- License.

Stiles 241 pl. 554.

holder to fell Timber, was doubted: But by Twisd. Though it be good against himself, yet it is void against the Lessor, because the License is derived out of the Interest, and so can be of no greater extent than it, and the Assignee of the Lessee may take advantage of it. 4. Whether the admittance of an Heir of a Copyholder by Dominus pro tempore be a Dispensation with a precedent Forfeiture; Mallet and Twisden conceived it was. 5. To say that J. S. is Lord, and the Tenants must attorn to them (being by the Lord) is a good Lease at will; but a bare Agreement that J. S. shall have the Land, will not amount to a Lease at will; by Sir Jeoff. Palmer Attorney General, which was not denyed.

May 16. Thin *against* Thin.

(75) Grants. Cum pertinentiis will pass things parcel in Reputation only. 8 H. 7. 4. b. pl. 1. §. 3.

The Court conceived, That Parcel of a Manor in Reputation only will not pass by the general words (of the Manor cum pertinentiis) in a Recovery suffered by Tenant in Tail a Fortiori, where the Issue was out of the Chancery, to find whether this Parcel was dockt by the Recovery, which doth only mention the Manor in general cum pertinentiis; but otherwise if the Grantor himself were seized in Fee (yet directed it to be specially found) because desired by Serjeant Maynard for the Plaintiff: And Foster Ch. J. said, That whatever his own Opinion were, he would never deny a Special Verdict desired by any Serjeant. And by Windham, Tenancy Escheat can never again be Parcel of the Manor, nor can any Man have the same Lands in Fee, and yet hold them of 2. Manors, though the Land may be parcel of one, and the Services of another Manor, which the others agreed. Post.

Salmon *against* Womake. Post.

(76) Quare Impedit.

The Bishop refused to admit a Clerk presented to an Avoidance on the Act 12 Car. 2. cap. for his preaching against, and refusing to baptize Infants; for which cause the Justices of Peace had declared it void, and turned him out by Order, which was removed hither from the Sessions by Certiorari, and excepted against. Sed Adjornatur.

May 17.

May 17. Readings Case. Ante.

BEing found guilty of Manslaughter, he desired before Judgment to hear the Indictment read, which was granted: But Twisden said, He never did see it done before after Verdict, nor any of the other Judges, but desired to see Presidents. Post. (77) Coron.

Crouch *against* Drury.

IN Evidence to a Jury, Twisden observed a Case betwixt Lee and Lee, That the Book of any Merchant is no good proof, nor may not be allowed to be read touching any Debt due to him; but of any Debt against himself it may be good enough, which was agreed per Curiam. 2. Depositions in Chancery after the death of the Party, shall not be allowed against other Parties, though one claim from him that so is deposed for by Wild Serjeant for the Plaintiff; but the Court allowed it to be read, because the Defendant could not be made a Party to the Decree betwixt the Plaintiff and him under whom the Defendant claim by a Debt subsequent to the Plaintiff though by a Conveyance before; which gave occasion to the suspition that this Conveyance was fraudulent; and though Depositions might not be read, yet a Decree is the Judgment of the Court, and therefore ought to be read, especially when the point of fraud depended thereon. 3. Bond presumes a due Debt till the contrary be proved, and it shall not be intended to be for performance of Covenants till the Defendant sheweth it. (Quære how the Defendant shall avoid such Bond that is for performance of Covenants in Indenture where the Indenture is lost or never any Indenture made revera) because the Plaintiff declares only generally. Post. (78) Evidence. Depositions. Godbolt. 326. pl. 418. Colligation.

On Affidavit that one of the Jurymen that served was not intended to try the Cause, the Court would not grant a new Tryal without it be alledged, that such Person thrust himself in, to do Favour to any of the Parties. (79) Tryal.

Readings Case. Supra.

BEfore the Indictment was read the Court demanded what he could say in Arrest of Judgment, who said, that it is ad Generalem Sessionem apud Castr. Lincoln in Comitatu predicto of Oyer and Terminer, &c. Extitit presentatum, without saying, (80) Indictment.

saying, Ad Generalem Sessionem Domini Regis; yet this may be helped by a Writ of Dimunition per Curiam; and then it
Hetley 119. was read, and he excepted. 2. That predict. R. was then present with the rest abetting, without mentioning whether at the place of the Wound, or of the Death. But by Twisd. If it had been that Feoffator quam Feoffatus habeantur pro Disseisatoribus, this relates to him that may be so. Also though the Indictment were void as to the Abettors, yet it may be good to the
Pardon. Principal. 3. He pleaded the Act 12 Car. 2. c. 11. of Pardon. But per Curiam, All Felonies are excepted by special Proviso. Sed Adjornatur.

Hill *against* Stern. Ante.

(81) PLaintiff declare in London, That if he would let the Defendant have a House in Cursitors Alley in Middlesex, that then he should have, &c. 5 H. 7. in special Action upon the Case for this Promise; after Issue joyned in London the words (in Middlesex) were omitted: For which cause the Court Arrest Judgment: for though such a Promise might lye any where, yet when the Action is special in London of a House which may be any where, it is therefore ill. Per Curiam and Twisden cited the Case of Reader *against* Palmer B. R. That a Man would stand to an Award made within a Month, and the Attorney added proximè sequent, which altered the very nature of the Promise, and therefore ill. And by Foster Ch. J. The Attorney after Issue in Promise for Juvencas made it up Juvencos, for which cause Judgment was arrest. Post.
Amendment. 2 Cr. 125. pl. 9. Godbolt. 385. pl. 473. 5 H. 7.

. . . . *against* Davies.

(82) H. Desired to be made Defendant, confessing Lease, Entry and Ouster, and at the Tryal refused so to do; for which Powis moved, that he may pay Costs, which the Court on Information of Hern Clerk Secondary, denied, because hereby the Plaintiff hath recovered, and so had the Fruit of his Suit; and none of the Judges remember any President to the contrary: but yet upon such a Refusal, the Court will give a Rule to the Defendant to confess it &c.
Costs.

May 18.

May 18. Blunket *against* Holmes. Siderf. 47. pl. 6.

A Demise was found by Special Verdict thus: I give my Messuage to my Son Thomas for his Life; and if he dye without Issue of his Body then living at the time of his decease, to Leonard a Son by a second Husband, and his Heirs: But if T. have Issue living at the time of his decease, then to T. and his Heirs. T. suffers a Common Recovery to the use of himself, &c. Allen for the Pl. This is no Estate Tail, because the Limitation to L. is not absolute upon an Estate Tail but upon Thomas's dying without Issue living at the time of his death: And this point hath been agreed by both Parties, and so waved it. But he argued that L. hath not any Contingent Remainder upon the death of Thomas, which is only when a Remmainder is in Obeyance until the Contingent happen: Com. 35. But by Executory Devise where the Fee is vested in somebody always, but to be divested by a Future Contingent, this cannot be by way of Remainder, because a Fee cannot be upon a Fee so and T. hath an Estate in Fee Simple (and not for Life only) immediately: T. being Heir at Law, and so had a Devise been to him for Life. This will not displace the Fee nor put the Estate in Obeyance: As Jones (who argued that T. had it but for Life) said, Relying upon Archers Case) which was a mistake: For Robert had an Estate there in Fee Simple, having only by the Will an Estate for Life, and being Heir at Law. 2. That was a Devise of a Remainder in Tail, and so an Obeyance of necessity, because the Contingent was subsequent, but here the Contingent is precedent and to be in the Lines of the Parties. And that T. hath a Fee simple is clear, because the Limitation is to his right Heirs (if he dye having Issue, &c.) which doth not make his Heirs Purchasers, but are declaratory, that if T. have no Issue, then L. shall have it. This giveth nothing to T. that he had not before, and this was the most genuine meaning of the Will; because the Sons being by several Venters, could not inherit each other, and so she made Provision for the Youngest L. by disposing the Writings in a Friends Hands for him. 3. When the Intent is dubious ut res magis valeat, &c. the intent of the Devisor shall be taken most favourably, especially when by such construction the whole Will may be fulfilled, as here, that T. if he had Issue, should have the whole Estate. 2. That the Common Recovery here by T. is no Bar, is manifest, because (the intended Recompence (which is the sole ground of Bars by Recoveries) reacheth not to this Remainder. So the Marquess of Winchesters

(83)

Demise. Br. 16. H Demised Copyhold to Bar. & Fem, and the Heirs of the Body of the Fem if they shall attain to 14. they suffer a Recovery, and then they have Issue, which after his death attains to 14. Sp. Verdict, 2 Leonard. 11. pl. 16. 1 Brant. 1, pl. 2. 2 Leonard. 92. pl. 115. 3 Cr. 526. pl. 5. 2 Cr. 461. pl. 6. That this is all one as to say, when T. dyeth without Issue.

Recovery. 1 Brant. 355. pl. 890. 6 Co 41. & 1 Co. 84.

cheſters Caſe, & Dy. 252. when he cometh not in by Voucher or in privity of Eſtate: And though Tenant in Tail be attaint or utlawed, yet a Recovery by him will bar, only becauſe of the intended Recompence; becauſe the Tenant might have counterpleaded the Vouching of any ſuch perſons, and ſo it is his own fault: And here Leonard hath no Contingent but a diſtinct Eſtate, and a Recompence cannot go to it, no more can it go to a Fee limited upon a Fee Reſervation, Br. & Rec. en value Br. Becauſe the Recovery in value muſt be of an abſolute Fee though by reaſon of a Warranty annexed to an Eſtate upon Condition. 3. L. though he cannot falſifie, yet he ſhall not be barr, becauſe as Pelhams Caſe: Such a Recovery is but upon Colluſion, which deſtroyeth the legal Operation of a Common Recovery, eſpecially where it is to avoid a Title: And L. needs not falſifie, becauſe he is a Stranger, and ſo not bound by this Recovery. Privies in Blood and Eſtate cannot falſifie in the ſame, but only in higher Actions, Conditions, Br. 26. & Boſwells Caſe. 6 Co. 52. And if this ſhould be otherwiſe, then great Miſchiefs would happen in common Aſſurances; as that after a Feoffment by a Recovery a Man may defeat all Uſes and Mortgages which are of the ſame nature with Executory Deviſes, there being no real diſtinction betwixt a Condition and a Contingency. And Pell *verſus* Brown is adjudged in all theſe Points, 2 Cr. 590. pl. 13. Finch for the Defendant, That L. the Deviſee is barred by this Recovery whether he take by way of Remainder or Executory Deviſe; but that the Defendant is in by way of Remainder is clear, and not within Pell & Browns Caſe, which was a Deviſe to T. and his Heirs, and on death of T. without Iſſue living, W. &c. And Dy. 330. The Law will rather make ſuch conſtruction, than ſuffer a Fee to be upon a Fee, which ſhall not be allowed but in caſe of neceſſity, 37, 38 Eliz. Sole *verſus* Gerrard C. B. A Deviſe to the youngeſt Son and his Heirs, and if he dyed before 21, or without Iſſue, then &c. here to avoid this Contingency they ſtrayned and made it. Or ſo 2 Cr. 415. And here the conſtruction muſt be ſtrained to make it otherways, (though if T. had not been Heir it would have been out of queſtion, yet) his being Heir will not alter the caſe, it being no miſchief that the Fee be in obeyance when the Freehold is viſible; and it is alſo the intent of the Will, which provides, that T. ſhall not ſell, &c. which could not be hindered by delivery of the Writings into a Strangers Hand: But admitting L. takes by Executory Deviſe, yet. 2. He ſhall be barred becauſe this Limiting of a Fee upon a Fee, is new; as 38 Eliz. Fulmeſtons Caſe, & 3 Co. Boraſtons Caſe, and the firſt Judg-

D. of Norfolks Caſe, pag. 9. Moor 422 pl. 590.

3 Cr. 359.

Judgment in the case is that of Pell *against* Brown, and hath been since a Serjants Case, and often debated, but never received any determination till (53) Jay *against* Jay, contrary to Pell & Browns Case. But the Recovery upon such a Contingency never yet received any Decision. And had the Recovery been by Title it would have barred clearly; and being private, is of the same Effect, and only to be avoided on the Statute 32 H. 8. by the same parties as the other. And it is not only the intended Recompence, but the favour of Common Assurances, as 9 Co. Beamonts Case, that gives Efficacy to Common Recoveries. So Hub. Duncomb against Wingfield, 1 Leonard 157 pl. 221. (which he commends, and Foster also) and otherwise all the Inconveniencies of Perpetuities will be de novo introduced; and though future Uses may be limited thus with a Fee upon a Fee, yet may they in many cases be destroyed, as in Englefields Case in Poph. 20. by an Attainder. And a Condition is Collateral without dependance upon the Estate, but this Contingency goeth with the Land, and is of the same nature with it, 6 Co. Mildmays Case. And in like cases a Recovery will bar, as Formedon Fitzh. & 4 Jac. the Earl of Cumberlands Case, A Fee depending on Estate conditional was barby such Recovery at the C. Law. And 6 Eliz. C. B. Moor Rep. 73 pl. 201. A Devise that if J. S. dye without Heirs Male, that his Executors shall sell this by such a Common Recovery, was barred, and all these without any intended Recompence, Rec. in value Br. Foster Ch. J. The not barring of the Recovery will set up Perpetuities. Windham, When a Precipe is brought against the Tenant of the Land, be it for Life with Voucher, that this (for the intended Recompence) should bar all the Remainders or Possibilities depending thereupon (if upon real Title) is clear. And so if Tenant of the Land (whereof Rent in Fee doth issue) suffer Recovery, this shall be charged with the Rent and have a Fee only charged with the Rent or with the Condition according to the Warranty. Twisden conceived this Estate to be a Fee, and that if a Collateral Ancestor suffer a Recovery vouching Tenant for Life, it will not bar the Remainders. Contra, where the Recovery is against Tenant for Life vouching the Lessor, &c. this will bar all Remainders or dependancies upon it. And though the Recompence giveth force to it, yet being Common Assurances, they will be construed more favourably than at C. Law: And in Pell against Brown the Judges argued upon several and different Reasons; and a Feoffment to J. S. and his Heirs till a Marriage had been gone by Recovery before by Twisd. though Foster cited the Opinion of Hutton to the contrary, &

B.R. Stiles 275. 2 Cr. 590. pl. 13 10 Co. 37. b. 2 Leonard 63. pl. 89. Dr. St. 89. a. Godsbolt. 26. pl. 7.

Adjor-

Adjornatur. And by Wind. He in Remainder had no Remedy at Common Law on recovery against the Tenant for Life. Per Default. Post.

Player *against* Barnadiston.

(84) By-Law. THe Sheriffs of London returned, that for the more indifferent way of Merchandize they have accustomed, that the Goods as well that were sold by weight as others of all Strangers before Sale ought to be weighed at the common Beam; and to enforce this, there is a By-law made with a Pain of 40 s. per Tun for not weighing. Allen for the Plaintiff, This is a good Custom (and though it were objected that men should be forced to weigh whether they sell or no, yet) because it may have a reasonable Commencement, because the City are bound to keep Officers there: And that they need not sell by weight but at their pleasure might be upon good grounds restrained, and being used long and confirmed by Parliament will be as well presumed good as a Custom that Goods Foreign bought and Foreign sold shall be forfeited: And sometimes these Courts have taken notice of these Customs: And admitting the Custom good, this Inforcement of it by a Penalty is good as well as restrayning the Carmen, Foreign Traders, &c. Twisden cited the Opinion of Justice Barclay, That this Court shall take Conusance of Recoveries in London, and conceive also the Custom and By-law good, and award procedendo nisi, &c.

(85) Dilatories. After Imparlance plead any Plea not admitted by it, as Joyntenancy, &c. and that upon Oier, which must be demanded of Deeds the same Term it is curiæ prolat. but if after by the course of the Court, the Plaintiff may bring in his Bond when he will; and therefore Oir being demanded the first Term, the Defendant shall have the space of that Term in which the Deed is shewn, to plead.

Gray *against* Phips.

(86) Repleader. THe Mispleader by default of the Plaintiff himself though it be in an Impossibility, if Issue be thereupon, as Reynalds Case, Hub. yet the Defendant shall have Judgment on the Plaintiff per totam Curiam, for his mistaking his own Plea shall not avail him.

Borough

Borough *against* Moor.

IN Error of Judgment against Executrix, in the Judgment it is recited true; but the time of the Appearance (was the same day) which being a Judgment entred by Agreement of the Parties and is but Inducement to the Action, which might have been only quod cum recuperasset, &c. therefore Windham moved that this may be amended. Adjornatur. (87) Amendment. Leonard.

Tomes Case.

ON motion to remove Indictment out of the Sessions for matter whereof they have Cognizance, is unusual without Affidavit of good Causes, because of Delays; but it being for Words, and he giving Bond to traverse it here so as to carry it down the next Assizes, it was granted. (88) Certiorari.

May 20. . . . . *against* Noell. Error Br. 55.

ERror being brought and shewed to the Attorney is no Supersedeas by Twisden, until it be shewed to the Clerk of the Errors, which is an allowance in Court: And therefore if Execution be done before it be allowed by the Judge or shewed to the Clerk of the Errors, it is well done, because the Attorney otherwise would never have it allowed, but only shew it to the Attorney of the other Side. But if he shew it and declare his Intention to have it speedily allowed, there Execution is Superseded in the mean time; but yet if Bail be not put in according to the Statute, the Execution may be well done, which the Court agreed. (89) Supersedeas. Marking the Roll, paying Fees for, or allowance by the Ch. J. of a Writ of Error is no Supersedeas unless actually taken out before Execution.

The King and Sanders *against* the Baily, &c.

ON a Mandamus to the Court of Aldermen of Brecknock to restore an Alderman, they return, That they are an Ancient Corporation, and have Power yearly to chuse, or at the death or removal of any, and that the Plaintiff was duly elect. And the Defendant was removed for divers Outrages, as taking away the Mace, and opposing the Swearing of the Plaintiff: But they shew not how the Plaintiff came to be removed, nor his Offence. And the saying quod clam & subdole he acted against them is not sufficient, nor doth it appear the Party was ever heard. Bald. for the Defendant on Mich. 23 Car. 1. Rot. 241. Catchin & Wargar B. R. A Writ directed to the Bayliff and (90) Return viz. 2 Leonard. 35. Pl. 43.

Conſtables, and the Retorn is by the Deputy-Conſtable and Suitors, which was held ill: So here, the Writ is directed to the Aldermen, Bayliffs and Commonalty, and the Retorn is, by the Bayliffs and Capital Burgeſſes, without the Commonalty, which, per Curiam, is ill, and not like a Retorn by any Juſtice of Peace upon a Writ of Error directed Cuſtodibus pacis, becauſe here the Writ is ſatisfied, but in the Caſe at Bar, the one part of the Corporation may make one, and the other part another Retorn.

Green *againſt* Green. Ante.

(91) Slandre. The words are actionable by Archer on 1 Cr. 332. and 2 Cr. 407. 1 Cr. 117. Becauſe if not Treaſon, yet they are a high Miſdemeanor, for which he may be fined: And theſe words were ſpoken not by a Madman (as was ſuppoſed) but by a drunken ſottiſh Fellow. And Foſter Ch. J. ſaid, That in his time all the twelve Judges were of Opinion, that words may be ſo laid, that they may be Treaſon. And by Twiſden, You ſpake Treaſon, was adjudged actionable, and ſo the Court agreed the words were here.

(92) Tryals. Nota. By Twiſden, Tryal at Bar in Trinity Term is not to be but in great neceſſity, or upon the Crown ſide. And 2. per Curiam, Notice of Tryal given upon Sunday is not good.

Lady Dacres *againſt* Hazel.

(93) Conſideration. 1 Cr. 530. 2 Brant 211. pl. 498. Com. 307. b. 2 Cr. 181. pl. 19. Gold. b. 173. pl. 106. IN Debt for Rent upon a Proviſo to make Leaſes (as in Mildmays Caſe) in a Covenant in conſideration of Natural Affection to ſtand ſeized to the uſe of himſelf for Life, his Wife for Life, and after to his own right Heirs. By Jones & Curiam, Here is no Conſideration to the Leſſee to raiſe any Intereſt to him out of the Covenant, as there would be if the Proviſo were to make Leaſes to his Son: And this Action was brought by the Widow of Mr. Chute as an Aſſignée to him againſt his Leſſee of Lands in Dorcetſhire.

Walcot *againſt* Tappin.

(94) Treſpaſs. IN Treſpaſs for breaking a Houſe and carrying away ten Peeces of Timber, which by Powis was moved in Arreſt of Judgment, That it is incertain, as B. R. 1656. againſt Tomlin, for certain Pieces of Cloth, not declaring whether Woollen

len or Linnen, yet good. But here it was ſaid, that Pieces of Wood is uncertain. Twiſden cited the Caſe of Web and Waſhborn, That Pieces of Hangings is good enough: And in Trover, for Hides, without ſhewing what Hides, yet good. And the Caſe at Bar was of 10 Pieces of Timber among other, and 40 Pieces of Raftures, &c. The Court agreed this ſufficiently certain, wherefore Judgment pro querente.

Player *againſt* Barnardiſton. Ante

(95) By-Law.

REeves for the Defendant excepted to the Return of the Habeas Corpus cum cauſa, 1. That the Cuſtom is, that all Goods of Foreigners uſually bought and ſold by weight being expoſed to ſale, ought to be weighed, which as it is compulſory, is unreaſonable. 2. The By-law is grounded upon a Cuſtom, where there is any Default neceſſary to be remedied, which he conceived is not here, becauſe that they may have an Action upon the Statute. 3. That 13 s. 4d. the Hundred is an unreaſonable Impoſition, which the Court doth think reaſonable. And by Twiſden, This is the Common Form of Return of By-laws. 4. Such By-laws are to be profitable to the City and People; this Reeve conceived is not ſo here, becauſe only the firſt Buyers are concerned herein. 5. The Reaſon of a By-law, viz. That there might be a juſt and indifferent weighing of all Merchandize is not in this Caſe, that exempts the Citizen and duly reſtrains the Foreigner, which is not adequate to the miſchief of the contrary. 6. They have not proportioned the Penalty to the Offence, but to the Subject Matter. 7. The By-law is made the 2d, and to take effect the 10th. of February 1658. without any Proviſion of notice to the Strangers (who are not concerned in the Common-Council) and yet muſt be bound to take notice of it at their Peril, which is unreaſonable. But by Twiſden upon the Chamberlain of Londons Caſe, Notice is not neceſſary on a By-law that is grounded on Cuſtom in London. Sed adjornatur. Foſter Ch. J. abſente.

Terry *againſt* Browne.

(96) Condition.

THe Juſtices declare Marriage void, being by Petition to them ſhew'd to be had by Fraud, though by the Wifes own, yet without Fathers or Mothers conſent; and if this be confirmed by the Act 12 Car. 2. cap. &c. of Judicial Proceedings was doubted on a Special Verdict in Treſpaſs, for taking away the Plaintiffs Wife; & adjornatur.

May 21. Blake *versus* Page. Ante.

(97) Prohibition. After an Appeal after Sentence in the Admiralty of that whereof at the time they had Cognizance, and so confirmed by 12 Car. now notwithstanding the Appeal, which is only a Suspension of Execution, the Plaintiff would have a Prohibition, but by Windham Justice, he shall not. Post.

(98) Tryals. Nota. Pro Regula, That an Action entred the last day of the former Term cannot be tryed before the last week in the next Term in London, unless it be by Proviso 2. Examinations of Witnesses by Interrogatories out of the Term, by Foster Ch. J. is Extrajudicial and not to be allowed, though the Parties consent, contrary by Twisden and Windham, consensus (if according to Law) tollit errorem: And the Court may as well allow the Examination of Witnesses before a Judge by Depositions, as read the Affidavit of a Person absent, this is no more than the Law alloweth.

Examination.

Foreman *against* Wright. Ejectment.

(99) Testament. In (56) H. devised, &c. and in (58) transcribed what he had formerly writ, and as he transcribed so he crossed the former Paper and made other Persons Executors by the last. Both were found privately in his Study after his death in a Drawer among Money and old things. But it appeared that the Testator should say that the Defendant whom he had made Executor by the last part, should never be his Executor, nor ever have any thing to do with his Estate. The first Part was under Hand and Seal, the latter brake off abruptly, referring to what was not crossed out in the former. And in direction to the Jury at Bar, Foster Ch. J. conceived, That the whole Will to which he subscribed, was void, and so Mallet; and that because Lands were not devisable at Common Law, therefore it ought to be clearer. And by Twisden, The Intent is the main, which is not sufficiently declared. And Justice Windham said, A Will by writing without Hand or Seal may be good, being published, or lying among Papers of concernment; but the last of these maketh no dispose of the Land as in the former, and therefore without the finding of both it is nothing available.

Carsel

Carsel.

LAnds out of the County Palatine in Lease were granted by patent without Attornment or Livery, and if it passed as a bargain and sale was doubted, 21 Ed. 4. 60. 1 Inst. 3, 14. b. And by Twisden on information of a Learned Person experienced in the Dutchy Lands, That the Grant of such a Reversion is good without Attornment, being out of the County to pass the Interest, though not to have an Action of Wast, &c. But by Wind. Out of the County the King and a common person shall be in the same condition, but the general Practice hath been as before. 2. By Windham, Acts concerning the King are publick, and need not be found by the Jury, but by agreement of the Parties the Stat. 37 H. 8. 16. was found. Post. (100) Livery. Com. 213. b. Com. 231.

Readings Case. Ante. Sidert. 40 pl. 3.

ALlen moved, That the Indictment for the Exceptions aforesaid might be quasht, because on Dimunition a Writ may go to Commissioners of Oyer and Terminer on removal of the Record tryed before them; but where an Indictment is removed and tryed, here Dimunition may not go down, as in Samsons Case. Windham, The Caption is waved by Judgment, and after that a Certiorari on Dimunition alledged may well enough go forth. And by Twild. ad Sessionem pacis without publicæ, is ill, but without Domini Regis, is good enough. And so of a presentatum extitit contrary of presentatum fuit: This is but a Relation of a former Fact, and by him according to Coopers Dictionary, the word extitit may be intended either present or future. And per Curiam, This being since March (59.) is not within the Act 12 Car. 2. cap. 11. but excepted by the words (other Felonies in the Proviso.) But by Allen, This is only for Felony of Goods, as Theft, &c. otherwise it would be repugnant to the Body of the Act that pardons Felony, till 24 June, 1660. But because it is of general concernment, Adjornatur. 2. Allen desired a Copy of the Indictment, which the Court denyed, but said, That of so much as they had moved in Arrest of Judgment they should have a Copy. (101) Dimunition.

Graves

Graves *against* Saucer.

(102) Action sur Case. Yet one may have Trespass against the other by 4 Ed. 3.22.b pl. 54. Trespass Br. 63. 204. One may demise the whole, 38 Ed. 3. 7. pl. 24. but cannot grant that Estranger agist his Cattle to the prejudice of his Companion, 45 Ed. 3. 13. b. pl. 10. 2 Leonard 220 Pl. 278.

AN Action on the Case for fraudulent disposing of the sixteenth part of a Ship, which is a temporary damage, on Cr. 16 Jac. Leicesters Case, is sufficient (though the property be not destroyed) for an Action on the Case; so Gower *versus* Danbuy, 26 Eliz. especially being fraudulently; because the Ship being a thing entire, and therefore may also be disposed of by one Tenant in Common, which being done by Fraud, is a good ground of an Action. Windham. Fraudulenter is not material but only where the subject Matter Warrants it; but in things entire the Law gives a Power to either Party to dispose of it, and the other hath no Remedy, for volenti non fit injuria, which the Court agreed; and that it was the Folly of the Tenant in Common that he did not take Collateral Security for his sixteenth Part, and nil capiat per breve Award: See Conscience Br. of 9 Ed. 4. 2.

Seignior Brunkerd.

(103) Patents. Stiles 135. pl. 301.

THe Farmer of Estreats of Amerciaments in the Exchequer moved, That this Court would not in diminution thereof levy their Estreats by Process of the Court by levari facias as hath been the ancient Practice, the Court agreed, that the Patent was good, but how they should alter the constant course before, at the time of, and since the Patent, they would advise by search of Presidents, and whether it be inrolled in this Court, and what Claim hath been made on such Patents.

(104) Demurrer.

A Demurrer to any Plea ought to have the Counsels Hand: And by Foster Ch. J. If it be frivolous he shall be fined, but on Demurrer to a Declaration by the Practice of the Court, the Hand of the Attorney is sufficient. But per Curiam, If that were good and the Demurrer were frivolous to the Declaration, the Attorney shall be fined; but neither ought to be without the Hand of Counsel, per Curiam, or with Warrant from him particularly: And he that doth otherways, shall be turned out of the Roll and pay Costs, as the Council should do if he demurred frivolously.

Serjeant

Serjeant *againſt* Madox. Ante.

IN Debt againſt an Aſſignee, Scrogs for the Plaintiff moved for Judgment on 1 Cr. 25. And Hob. 316. That the Iſſue upon the Aſſent, as 5 Co. Nichols Caſe, though immaterial, yet after Verdict, is good enough on 32 H. 8. 31. there being no Default in the Plaintiffs Declaration. Allen for the Defendant agreed to theſe Caſes, but ſaid, That if the Immaterial Iſſue by the Plaintiff or Defendant upon an immaterial point be found, Judgment ſhall be according to the Verdict if it be found againſt him that pleads it, but if it be found for him that pleads it, that was held to have been a Jeoffail, in Nichols Caſe, eſpecially when a Material Iſſue is offered, and the Plaintiff will plead ſo immaterially. Twiſden, Where Iſſue is improperly joyned as (Chouſe *againſt* . . . ; 1 Cr. 190.) On the Traverſe of a Concluſion there Judgment may proceed, but as Jones Caſe. And Hob. 197. on Duces plead to a Bond the Plaintiff replyed that he made it not per minas, and Iſſue thereon, this being immaterial (though a perfect Iſſue) yet the Plaintiff ſhall not have Judgment. And ſo in Stiles 150 pl. 340. The Caſe that was here betwixt Jennings *againſt* Lee 1649. B. R. in Treſpaſs, The Defendant juſtifies in defence of his Wife, Plaintiff replyed de injuria ſua propria, and an Iſſue joyned thereon, which was held ill. And by Foſter Ch. J. This Plea upon the Aſſent is concluſive to one party, for if there were no Aſſent, no Action would lye. Sed Adjornatur, Windham abſente. (105) Jeoffail. See Dett Br. 43. Stiles 71 pl. 151.

Player *againſt* Barnardiſton. Ante.

REeves for the Defendant admitting the Cuſtom good, yet there was no neceſſity of it, becauſe there was a Remedy convenient before by Action upon the Statute. And 2. This is not for the benefit of the people in general, as 19 Aſſizes 6. 3, Being Penal againſt Foreigners muſt aver notice, which is not provided for here, 1 Cr. 498. James *verſus* Tutne, Although if it had been the Cuſtom all perſons had been bound to take notice of it, yet not ſo of any By-law. Allen for the Plaintiff prayed procedendo, becauſe where there is a Cuſtom without means to enforce it, that may be made by By-law, as in reſtraining Foreigners to ſet up Trades on pain of 5 l. and the party cannot have any Action upon the Statute, nor the Mayor and Commonalty, for they have no loſs thereby. And 2, being in purſuance and ſtrengthening of the Cuſtom, muſt (106) By-Law.

by

be for the peoples benefit as well as the Custom. 3. Notice is not necessary, because nothing de novo is done, but pursuant of the Custom; and every person trading in the City is to take notice of the Law of the Place, and else all the By-laws in London would be overthrown; and the Party may excuse himself by being ouster le mere, &c. but the Court otherwise will intend notice. Twisden, There is equal Remedy, as 5 Co. Greyes Case; and in Annuity pro Consilio, the Party may refuse, so he may to carry his Goods to the Beam; and for notice it was never seen, but if it be bonæ fidei consonum, and both Parties have equal Remedy; and to enforce a Duty, it will be good enough without notice, especially in London where the By-laws resemble Acts of Parliament. And by the whole Court a Procedendo was awarded, because all that are Merchant Traders at their Peril ought to enquire into the Law of the Place. By Foster Ch. J. Dy. 322. pl. 23.

8 Eliz. 2. Poult. 1070.

(106) Arrest. NOta. A Person was arrested at the Suit of A. and a feigned Name of Attorney put in, whereby the Party arrested knoweth not how to put in Bail or be discharged. And thereupon Foster Ch. Just. and the Court pronounced a Rule to disallow any Attorney to practice in anothers Name, or any Man to be a common Soliciter but only in particular Cases: also that none shall be arrested on a Bill of Middlesex, without the Name of the Officer attesting it.

Eden *against* Chalkhill.

(107) Tryals. TRyal at Bar on Poverty of the party Plaintiff, and Consent of the Defendant was granted to be in Trinity Term, but not to be made a President.

(108) Priviledge. Nota. The Kings Servant is not so priviledged from Arrests, but that the Sheriff ought to return his Writ, unless he sheweth his Priviledge on the Arrest.

Croutch *against* Drury. Ante.

(109) Tryals. TWisden Justice said, He never knew a new Tryal at Bar except in Woods Case, where there were unmerciful Damages and suspition of tampering with the Sheriff. And where there are many Tryals of the same nature, and the Verdict of the latter go contrary to the former, there a new Tryal hath

hath been awarded. But by Twiſden, He never knew any o-thers in the ſame Action, eſpecially where one may have an o-ther. And by Foſter Ch. J. Without an apparent practice and deceit it ought not to be granted, only becauſe the Jury give a Verdict contrary to expectation. 2. Fraudulent Conveyance Deceit.
is not when one party only intends to deceive, and the other is Purchaſer bona fide, but where both parties conſpire to deceive, and to that intention make a Conveyance.

May 24. Terry *againſt* Browne. Ante 35 pl. 96.

ENtred Trin. 1659. Rot. 959. That the Judgment of Di- (119)
vorce being not warranted by the Act of Marriages in (53) is not confirmed by the Act of 12 Car. of Judicial Pro-ceedings; and by that Act all other Marriages than by Ju-ſtices of Peace, are declared void, but the party was never in-dicted for fraudulent or violent Marriage, or violent taking, which doth not appear by the Verdict; but after that clauſe of (no other) was taken away by a ſubſequent Act found, and then this Marriage was had before a Parſon. Archer for the De-fendant, That the Sentence is confirmed, the Act of (53) to this purpoſe is made as a good and valid Act of Parliament; the Caſe is not within the Clauſe of Repeal in (56) being found and admitted a good Marriage; but being fraudulent, as ap-pears by the Circumſtances found by the Jury, that ſhe was ſtoln and clandeſtinly married in the Night, and they may as well proceed by Information as Indictment, or otherwiſe upon motion and publick notice. And it appears they had a Com-plaint, and proceeded thereupon according to their power then, and therefore their Sentence confirmed. Windham, The Ju-ry find not any expreſs fraud or force, but Evidences of it, but that is not enough to enable the Juſtices to the Conuſance of the Cauſe. Twiſden, Though the Juſtices determin it to be Fraud, that will not make it ſo if it be not expreſly found, and the Juſtification muſt be poſitive or ſpecial, as in the Chancel-lour of Oxon's Caſe. And 2. Generally things left to Juſtices of Peace are intended (without ſpecial words) to be proceeded upon by Indictment; but for the dangerous conſequence of this, if they might proceed only by Indictment that every Act they do of Fact ſhall be re-examined by Jury, and becauſe the general practice of the Juſtices through England was then to proceed by Petition and not by Indictment, the Fraud ſhould be found; yet this is not ſo neceſſary to find expreſs Fraud as where it is upon Pleading, and Iſſue thereupon: and now the Court is not to judge of Fraud, but to affirm the Judgment

of the Justices of Peace that is found by the Jury. Adjournatur.

Coxe *against* Warwick. Ante. In Dett Br.49.

(111) Debt. BAldwin for the Plaintiff, That Debt lyeth for a Rent Seck for years, on Lit. Sect. 228. by the Assignee of the Lessor for years having Attornment of the Grantee, because he hath no other Remedy; and beside, the Attornment is in it self an implied Contract also 5 H.7.8.b. Debt Br.41. For the Devisee of such a Rent without Attornment Dett may lye; and so against Grantee of the Lessee Debt lyeth, Mansells Case: & 6 Co. 58. b. Bredmans Case. And as the Remedy for a Freehold is an Assize, so Debt for Rent of a Term for years. 2 Ed. 4. 11. a. Br.17. 2. Powis for the Defendant agreed, That it is only a Rent Seck, but without Remedy before Seisin had, though after he might have had a Writ of Annuity, but now here wants all manner of Privity, unless a double Privity should be created; he agreed the Cases cited, but conceived that upon the Act of God, which, as Ognells Case, that resolves the real Contract into a Personalty, though there, rather than be remediless, Debt may lye, yet not so where it is the Act of the Party himself to determin it. If it had been an Original Rent granted out of the Land, Annuity or Debt may lye, but not so here, notwithstanding Attornment, which is but an Agreement to enjoy as the Law will: as in 2 Jac. Rot. 2660. Warner *versus* Agnas: Lessee for Years surrendred rendring Rent with a Clause of Distress. If this had not been made he conceived that the Rent had been remediless: and alike is L. Co. 46. b. but he relyed on 2 Ed. 4. 11. a. Windham Justice upon L. 5 Ed. 4. 42. b. conceived, That the Action of Debt lieth as well as for an Annuity, which hath been resolved also lately. But the Attornment being a bare Ceremony, he agreed it will not make any new Contract. But here betwixt Lessor and Lessee the privity of Contract is by reason of the Rent, as 45 Ed. 3. 8. and so is transferred with the Rent to the Grantee. As on Lease of a Fair reserving Rent, Debt lieth, and yet no Reversion but only a Contract. Also Debt for Rent Charge may lye every Year the Contract being Annual: and where Remedies may be given without manifest inconvenience, they shall be as Yelver. 51. much favoured. Twisden Justice to the same intent, because the Rent was Originally subject to such an Action before Assignment. And 9 H.7. 16. much guide him, F.N.B. Annuit is against 19 H. 6. 42. by Askue. & 7 Co. 47. b. Lylingtons Case, & 44 Eliz. Benloes against

Debt Br.91. 175. per Neut.

againſt Philips, B. R. Grantée of a Rent Seck that is ſo Originally, ſhall have Debt in favour of Remedies. Maller to the contrary, and Foſter Ch. J. doubted, but inclined, that the Action lieth on P. 30 Eliz. Auſtin *againſt* Smith, A Coppholder by Licenſe makes a Leaſe for years, and after grants the Rent over with Attornment, it is a quære if Debt lieth. Adjornatur, Dy. 140 pl. 38.

Salmon *againſt* Ellis.

(112) Quare Impedit.

Juſtices of Peace put out a Parſon for being againſt Infant Baptiſm, the Defendant removeth the Certificate of the Juſtices; and here Spilman moved for a Procedendo, or that the Judges would declare ſome Opinion, which by Windham would be Extrajudicial, and they refuſed both, leaving him to his Quare Impedit if illegal.

Curlois *verſus* Bacon.

Sidere. 39 pl. 2.

(113) Demurrer. Leonard 124. pl. 1. 3 Cr. 139. pl. 15. 2 Cr. 544. pl. 4. Noy 132. 1 Brant 125. pl. 280. 2 Cr. 625. pl. 19 1 Cr. 178 & 55 Yelverton 65. pl. 94. Reports.

In a Sc. facias againſt ſeveral perſons they plead ſeverally, and the Plaintiff demurs to all joyntly quod ſeperalia placita, &c. this by Allen is good. And he cited 8 Car. 1. Rot. 420. B. R. Croſs *againſt* Norman in Covenant upon ſeveral Breaches. The Defendant pleaded ſeveral Pleas; the Plaintiff demurs quod placitum predictum, &c. this was there ruled good. And Juſtice Twiſden cited Tucker *againſt* Honywood 44 Eliz. This Plea ruled good; and that 15 H. 7. 10. b. Dy. 182. Fiſh *againſt* Broket, and Chapman *verſus* Dalton Jac. It was ruled that ſuch a Plea was not good, but the Current hath been contrary. And by Windham, The new Reports being but promiſcuous, are no farther to be credited than as they are conſonant to the old, or agreeing with the Roll. Dy. 325. pl. 4. Veniat Aſſiza de titulo, where there were two Titles, yet good, becauſe Title is nomen collectivum. And he agréed with Twiſden, that the Plea is good, Reddendo ſingula ſingulis; and Foſter Ch. J. to the ſame intent, and ſo Judgment pro querente.

And by Twiſden, The Caſe of Chapman was, where upon a Demurrer on one part, and Iſſue upon the other part of the Plea, the Plaintiff ſaid quod placitum predictum, which was uncertain which Plea it ſhould refer to.

(114) Treſpaſs. Damages Br. 141. per Huſſy, 2 Cr. 74 pl. 3.

Treſpaſs for taking and carrying away eight Ferkins or Pots of Butter, after Verdict ſhall be intended Synonyma. Alſo where Damages for Goods are recovered againſt J. S.

J. S. shall have Trespass after for the Goods, for none may have both Goods and Damages, 21 Exod. 34.

(115) Copy. Upon a Contempt pardoned by 12 Car. 2. as Fossels Case 4 Jac. the Parties can proceed no farther, but yet the Court will not take notice of any contempt that the Parties are in, without special Pleading, upon a bare Motion only.

In the Admiralty.

(116) Admiralty. 1 Cr. 296. NOta. There by Hide Judge, that in the case of the Dutch Pacquet Boat seized at the Suit of the King, and for Contempt and Misdemeanour of the Master, that this is bailable at the value of the Appraisment. But where the Boat it self is seized at the Suit of the King for Misdemeanor of the Boat to which the King makes Title, that is not bailable: Which difference was moved by Dr. Turner, and agreed by all the Doctors. 2. That Appeal upon a Sentence may be ore tenus within 15 days, but after shall not be admitted without the Seal of the Court shewed.

24 H. 8. 12. §. 7.

May 25. De la Bar *versus* Gold. In Debt Br. 79.

(117) Consideration. 1 Brant 334. pl. 861. 1 Roll 26. ALlen moved in Arrest of Judgment in Action upon the Case upon promise, That in consideration J. S. on the part of the Plaintiff let to W. who let to Gold the Defendant the half of three eight Parts of a Ship, the Defendant upon forbearance of J. S. to Attach the Money of W. in the Hands of Gold, the Defendant promised to pay what was due to the Plaintiff, that this is no good Consideration because it doth not appear the Defendant is concerned therein, the Plaint being betwixt J. S. Agent for the Plaintiff, and Wood (which is necessary previous to a Foreign Attachment) Wild for the Defendant, That the Consideration here is not that the Defendant would pay to the Plaintiff, but, as Hob. 216. Bidwell's Case, that if J. S. would forbear, the Defendant would pay what was due for the Fraight; and here is a loss to the Plaintiff of his Attachment by J. S. and an advantage to the Defendant: and therefore though the Consideration be betwixt other persons, yet if it have any influence upon the Defendant it will be good. Windham, If the Promise had been to J. S. from whom the Consideration moved that the Defendant would pay to the Plaintiff, that would have been good, which Allen agreed contra where the Promise is to the Plaintiff only from whom no Consideration moved. Twisden, Upon a Collateral Promise

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on a Marriage to a perſon unconcerned, as Yelv. 54. Muſgrave *verſus* Wharton, the married Perſons ſhall not have benefit; but otherwiſe where the meritorious cauſe ariſeth from a third perſon as in a Promiſe betwixt Parents on Marriage of their Children, there either party may have the Action. And by Foſter Ch. J. If one promiſe to give 500 l. with him that ſhall marry his Daughter, if J. S. a Stranger doth it, he ſhall have an Action upon the Caſe for it. And Wild cited a caſe, that A. indebted to J. S. &c. depoſits goods for this Debt with J. N. and in conſideration that J. N. would deliver the Goods, A. will paye to J. S. it was ruled that an Action upon the Caſe lyeth. Adjornatur.

The Tranſcript of a Record is in placito coram Olivero St. John; the Roll that is here removed is in placito coram Edwardo Atkins, this was here amended after Error brought. (118) Amendment.

Page *againſt* Blake.

The Plaintiff in the Court of Admiralty (that is now Defendant) had Judgment in the Admiralty on a Charter-party made on the Land, after which the Defendant (now Plaintiff) appealed, and after that he here prayed a Prohibition: and Powis for the Defendant in the Prohibition conceived, that the Suit there being according to their Power, is confirmed by the Act of Judicial Proceedings, notwithſtanding the Appeal, which is only a ſuſpenſion of Execution: and by the Court the Prohibition was denyed (119) Prohibition.

Foxe *againſt* . . . . .

Nota. Acceptance of a Declaration after the Term is not good per Curiam, though the Attorneys or Parties agree to it, being delivered by the by. So is Stiles 321. pl. 687, &c. (120) Pleading.

Nota. Indictment may be amended the ſame Term that the Caption comes in, but not afterward: but by all the Bar, an Indictment for Perjury ſhall never be quaſhed, but the Party will plead immediately. (120)

Heath

Heath *versus* Godlington.

(121) ON a Latitat H. did not bring in the Body, whereupon Debt was brought on Peter against Fox in Hil. 1657. Rot. 1144. against the Manucaptors, and it was said to be ruled upon Argument in Lamden against Carden, Rot. 1230. and Markland against Kelway on the same point in Error, this Term adjudged that the Action lyeth. But by Foster Ch. J. He may plead on the Scire facias that which he may not plead in Debt: Nor can the Manucaptors have any Power (which the Law and Practise of the Court alloweth) to bring in the Principal, and beside the Plaint. might sue this notwithstanding the Principal were brought in; for which Reasons the Court stopt the Proceedings on the Declaration, and on rendring of the Principal he was committed in discharge of the Bail. 2 Leonard 29 pl. 33.

(122) Nota. An Administrator who brings an Action of his own time shall have Costs; as Worfields Case 3 Car. 1. B. R. per Curiam.

Coxe *against* Shipwell. Ante 23 pl. 16.

(123) Amendment. AT Doncaster in the Court of Kings Bench at W. in the County of Middlesex then being, 5 Ed. 4. 7. 17 H. 6. 10. This being after a Verdict, the Court cannot Judicially take notice where the Court is held. 2. If there had been no place mentioned this Plea had been good enough, and here it is Repugnant, and so void, and as none. But by Wild, If the Action be local, the Court will never give Judgment upon what Plea soever out of that place as this Debt upon a Judgment is to be only where the Recovery is, which the Court agreed, and doubted if a Plea were pleaded out of the place, that is not material where the Kings Bench was. Bulwers Case Judgment Arrest.

Siclemores Case.

THe King may waive his Demurrer in Civil, but not in Criminal Causes, by Allen for the Prisoner: but per Curiam, the Demurrer is by the Clerk of the Crown, by the Misdemeanour of whom the King shall not be prejudiced. Also the Court required Presidents of this to be shewed by the Prisoner, because the Kings Prerogative is general that he may waive his Plea; but no Presidents could be remembred where such Waiver had been in Criminal Causes. And by Allen, The Presidents must be in the Affirmative, not Negative, but Curia contra. Post. (124) Prerogative.

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1661. An. 13 *Car.* II. in *Banco Regis.*

Foster *Chief Justice.*

June 14. Mallet, Twisden, Windham.

IN Woods Case, and Sir Tho. Somes Case, and in any Case where it appears to the Court before whom the Cause was tryed, That the Damages were excessive, per Curiam, a new Tryal shall be awarded. (1) Tryal.

Smith *against* Warner.

TRover pro Certago, the Postea Catago Anglicè a Frying Pan, which by Maynard, who moved for Judgment, is well in the Declaration, but there nonsense: As Hob. 191. with an Anglicè shall be good. So in H. 4. Jac. Wood against Smith de duobus Articlis & de duodenis fili of Thread, which was supposed uncertain whether of Graynes, Pounds, &c. Yet 2 Cr. 129. after Verdict Judgment was given. But by Powis, If it be ill it may be amended, the Plea-Roll being right. But by Twisden, Then the Jury may be attainted who have found Damages for it upon a new Invention of an Anglicè, if that will help; But de vestibulo, Angl. a Feather-bed, ruled naught; and so of any known ancient Words, an Anglicè will never help. Adjornatur. (2) Trover. Stiles 69. pl. 142

Dr. Witheringtons Case. Ante.

(3) Mandamus. HE was ousted by the Master and five Fellows without admonition contrary to the Statutes of the House, which require three Admonitions, and that the Master and seven be present to displace any Man. And because the Colledge had delayed and trifled with the Court, they grant an Alias with a pain of 100 l. returnable within a Week.

Greens Case. Ante.

(4) NO Fees may be allowed by the Secondary unless the Attorney bring a Note under such Councels Hand to whom they gave it; as Cr. especially if he be not an Attorney of a Court of Record, according to the Statute 21 Jac.

The King against Fitz & Castor.

(5) Indictment. AN Indictment taken by the oaths of, &c. and doth not say they were probi & legales homines, yet being for taking away Stones of a Church, the Court would not quash it, but put the Defendants to plead or demur.

Nuttal *against* Page.

(6) Slandre. AN Action upon the Case for Slanderous Words: N. that was Solomon Smiths Clerk is a Rogue and a Knave and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the Kings Hand and Seal (without express charge) on 2 Cr. 206. 321. was moved in arrest of Judgment: and it was said in Ireland against Bootheman in C. B. The Court were divided in Opinion, That if J. S. had had his due he had been hanged for stealing Sheep, but breaking a House may be only a Trespass, and a Seal is uncertain alone. By Twisden, Whether it be the Great Seal or little Signet, or any other, therefore the Court stayed it. Post 56 pl. 16.

Dominus Rex and Siclemores Case. Ante.

(7) Preragative. ALlen for the Defendant supposed, That the Act of Oblivion had discharged him of the Manslaughter; and after this Error shall not be brought to reverse the Attainder of Manslaughter. Twisden, The King may the rather bring a Writ of Error, because the Act doth not extend to Erroneous Judgments

ments or Utlawries. And by Windham & Curiam, Error is the only way. The Errors were, 1. Because it doth not sufficiently appear that he was *secundo exactus*. 2. In Com. meum, not said Suffolciæ ad Curiam ibid. tent. which is ill, though in Comitatu Suffolciæ, which is necessary to be in the Margent: Because his Court held for his County for ought appears may be any where, and is uncertain, as 11 H. 7. and this hath been a common Exception. 3. At the tertio Exact' Wiseman was made Sheriff and saith, at his Court, not saying where. And for these Errors all the Court reversed the Utlawry. Also the Ven. fa. was before Q. St. John Justice of Peace and Oyer and Terminer, and doth not say, Justice of Gaol Delivery. Allen, The Writ is brought in the Prisoners Name, which he denyeth: But by Twisden, This is but ore tenus, which the Court cannot take notice of; which was agreed by Windham, especially when Judgment is given to reverse the Indictment, upon such Writ he shall be estopped. But by Allen, The Judgment is yet in the Breast of the Judges, which yet the Court will not alter, being for speed of Justice. And by Foster Ch. J. a Release of a Void Judgment is not good, nor shall be accepted without Assent of the Attorney General. But by Twisden, Issue on these Errors is not usual, but they are the bare suggestions and desire of the Party: also these Errors are in the very Plea of the Party, and therefore the Court may give Judgment upon it, especially being, by Windham, to further Justice, and not to defend the party against wrong. Sed Adjornatur. Error.

June 15.

Nota. The course on Arguments is, That the Plaintiffs Attorney delivered Books to the two Senior Judges, and the Attorney of the Defendant to the two puisne Judges. (8) Argument.

Weden *against* Baldwin Ante. Ejectment.

The Plaint. declared on Lease made by H.B. and by Special Verdict it is found that T. B. was seized in Fée of Lands in Capite jointly with his Wife for their Lives, and to the Heirs of T. B. and that T. B. is seized of the Lands in Question in Fée in his own right, and devised all his Lands in W. to his Wife, and after her decease deviseth to H. B. and Howel argued for the Defendant, that the Devise is good but only for a third part, and said, That herein it is considerable if T. B. hath power to devise any part of these Lands, and he held (9)

that he cannot, because prima facie he was seized of a Joynt Estate for Life with a Remainder to his Heirs; but it is uncertain of what quantity of Lands he was so seized of, or of what Estate, because this may be intended several ways, and therefore no certain Judgment can be given thereupon. For if they were thus seized before Marriage, then they take by Moieties, if after, they do not; they might be Joyntenants by one Conveyance, and several by another, or they might be seized joyntly for the Life of the Wife. The Verdict should be as if it had been pleaded, though the words of lay gents be found neither the quantity nor the quality of his Estate, as in Lovyes Case, 10 Co. 83. is found, nor that he had no other Lands of the same Tenure, Dy. 366. which was necessary. But supposing the Lands capite to be two parts, yet having once disposed all, he cannot dispose of the third part, being Soccage, 2 Co. Binghams Case. As if the Case were as 25 H. 8. 55. That T. B. had once executed his power for the two parts by Feoffment to the use of him and his Wife, as in Dy. 237. Also if they had the Estate by purchase, he cannot dispose it because they do not take by Moieties, Co. 28. Butler & Bakers Case The Fem may after the death of the Baron have her Estate, Dy. 9. but not so where they take by Moyeties; yet the Fee is in him to whom it is limited, as to Estrangers Gard, F. 48. Pet. Br. 303. and shall not be in Contingency, Relief F. 40. and the Verdict it self hath found that T. B. died seized, which will overthrow the Objection, that he died not Tenant to the King: and however, if he had had but a Right, it is sufficient to make him Tenant within the Stat. 32 H. 8. 1. But dissee, as Litt. 106. to many purposes is actually seized, Mortdancestor Br. 59. 16 Ass. 11. It is in the Heirs Election to have Mortdancestor on the death of his Ancestor, Joyntenant for Life with Fee to him limit Dy. 368. And here the Baron, although he had Estate for Life joynt with his Wife, yet he is sole seized in Fee. Twisden conceived the Verdict utterly uncertain, because that the Devise of the third part is not utterly void, and so all the Court agreed. But by Allen for the Plaintiff, this devise is good for the whole, and so the Verdict is good; but it agrees, that if it be void for the third part, that then it is uncertain. And by Foster Ch. J. The ancient course on devise of more than two parts an inquisition was awarded to enquire of the value of them: also the Court will intend that they were seized as Husband and Wife, and to the Heirs of the Husband, and not otherways. And by the Agreement of the Parties the Special Verdict was amended in the uncertainty of the third part, and made that a full third

Leonard 267. pl. 358.

Seisin Br.

part

part deſcended, becauſe otherwiſe if the Verdict be ſuch that no Judgment may be given upon it for Plaintiff or Defendant, a new Ven. fa. would be Error, becauſe the Court muſt give Judgment where the Verdict is totally defective. Windham, A bare Remainder of Capite Lands will not hinder Deviſe or diſpoſition of the Soccage, becauſe ſuch perſon is not Tenant. Sed dubitatur, whether Tenant for Life the Remainder to him in Fee ſhall be ſaid ſole ſeized, ſo that he may deviſe, Ployers Caſe, per l' Eſtat. 182 pl. 208.

Uſher *againſt* Buſhley.

Syderf. 39 pl. 1.

IN Treſpaſs for Money and goods, after Verdict this ſhall be intended ſua, as they ſhall be if they be in my poſſeſſion, though they be feræ naturæ, and I may have property in them by Reclaimer, Regiſter 93. And if it be good in a Writ, it may be good in a Bill, by Wild Serjeant, who moved for Judgment for the Plaintiff. Windham, When the Words are general, and after per videlicet it is ſaid as in 12 H. 8. 3. That he was ſeized in particular as ſua, as 12 H. 8. 9. that will not aid after Verdict, but otherways when the Words are particular at firſt; for the Defendant was cited 43 Ed. 3. 24. Br. Treſpaſs 64. 16 Ed. 4. 7. 1 Cr. 544. Dy. 307. 7 Co. in Arreſt of Judgment. Adjornatur. (10) Treſpaſs.

Croſts *againſt* Wilkinſon.

TReſpaſs for taking away a Mare, the Defendant ſaid, that before the taking the Defendant (being the Kings Baily) he by Precept out of the Court of Pomphret to make Execution made it on Levari facias to bring the Mony into the ſaid Court, adjudged for the Plaintiff there, &c. It was excepted by Wild, that he doth not ſhew in certain the Judgment, nor the recital of the whole Record, Plaint, &c. Nor he doth not ſhew the Juriſdiction of the Court, which, per Curiam, is neceſſary by the Baily of an Inferior Court, eſpecially becauſe that he juſtifies by reaſon thereof, as in the Counteſs of Rutlands Caſe. And it muſt appear that the Court hath Conuſance of the Cauſe, otherwiſe he cannot execute their Precept. Judgment for the Plaintiff. Niſi. (11) Monſtr. 2 Cr. 46. Leonard 220. pl. 303. Yelverton 46. pl. 63.

againſt

. . . . . *against* Madox.

(12) Error. F.N.B. 20. NOta. If the Plaintiff doth not remove the Record on Error after three Terms, a non proceſs may be entred on a Rule given to them by the Clerk of the Errors or the Attorney of the other Part, which was made a Rule, per Windham & Curiam.

Banbury *verſus* Newland & Corps. Priſt.

(13) Unc. Priſt. COvenant for that the Plaintiff Leſſed to the Defendant certain Tythes, and the Defendant rendred Rent and entred into Bond for Security, the Defendant for part pleaded payment, and for the other part tender without uncore priſt, and for the other part that he is ready to make the Obligation. This by Wild for the Plaintiff, is not ſufficient, but he muſt do it at his peril, which the Court agreed, and Judgment pro querente per Curiam niſi. Alſo for every ſeveral point he ſhould have put himſelf upon the Country, becauſe the Plaintiff had alledged non ſolvit, but otherwiſe Iſſue ſhould be taken by the Plaintiff, which the Court agreed.

Gwin *against* Lloyd & Bold

(14) Sc. fa. ERror to reverſe a Judgment given at the Grand Seſſions in Angliſie, becauſe the Warrant by the Writ of Summons appears to be after the Dedimus poteſtatem, and after the Common Recovery removed, & in nullo erratum pleaded upon ſuggeſtion at the Bar, that others were Tertenants, a Sci. fa. was awarded againſt Ellen Gwin, who pleaded in Abatement & ſaid, that there were other Ter-tenants as T. Gwin not named, whereupon the Plaintiff demurred, becauſe that it was not neceſſary to the Ter-tenants, as Dy. 321. but to the Heir: and the Ter-tenant is only warned to appear, to ſhew why the Judgment ſhould not be reverſed and his Land ſaved to him, but he cannot plead in Abatement, 30 H. 6. 2. or any thing which concerneth not himſelf. By Allen for the Plaintiff, The Tenants Plea muſt be to the Poſſeſſion, not to the Errors, and this Plea is againſt the expreſs Return of the Sheriff that he is Ter-tenant, and he cannot take Iſſue thereon. Alſo if Execution be againſt one Ter-tenant ſole, this ſhall be avoided by the others by Audita querela: alſo here there is no certainty of what Quantity the other is Ter-tenant. Williams for the Defendant, that he ſhall not be charged before all the other Ter-tenants be ſerved. 1. That a Sc. fa. is neceſſary againſt

2 Cr. 506. pl. 19.

the

the Ter-tenants as well as against the Recoverers, on Dy. 321. & 2 Cr. 392. 160. M. 38, 39 Eliz. Owen 157. C. B. Rot. 545. Carne *versus* Warren 21 Ed. 3. 56. Holland against Jackson. 11 Car. 1. B. R. To the same effect Bridgman 11. 70. Also 2. If this be necessary, yet being general that award without particular names this cannot be satisfied by particular Return, and the Ter-tenant coming in due time and pleading such a Plea, the Court in discretion will not leave him to an after Game. Also 3. It must the rather go out against this Ter-tenant as the case is, because otherwise he shall be finally concluded by the Judgment, because he cannot come in upon a second Sc. fa. because he had liberty upon the first. But 4. Admitting the Plea frivolous in her Mouth, yet because such a suggestion as Sc. fa. 138. 2 Ed. 3. 56. as Amicus Curiæ to the Court is a sufficient ground for a Sc. fa. against the Ter-tenant. Windham Justice on 47 Ed. 3. in a Sc. fa. on a Judgment or Recognizance such Summons to the Ter-tenant is necessary, and so it may be here in a Writ of Error on a Recovery, because it is not dilatory, being the first Sc. fa. therefore he conceived the Sc. fa. must be awarded, but the Pleas of Ter-tenant ought to be proper. And by Twisden, any thing that may extort Execution against him, but nothing against the Errors; and though this plea be not proper, yet as amicus curiæ, this will be good. As Dimunition alledged by the Lords mediate or immediate. Also by Windham, an Averment may well be against such a Return of the Sheriff, because he is not omniscient. And by Twisden, The Writ that is directed to the Heir and Ter-tenants, and if it be executed only as to the Ter-tenants, yet the Heir may come in and plead that he is Ter-tenant, &c. And here that the Writ is general, as 1 Cr. 312. Eyre against Danton. And Per Curiam, this is a common Assurance, wherein it is the discretion of the Court that none may have prejudice by too quick dispatch; and here the Plaintiff at his peril must seek out all the Ter-tenants. Post.

Hanke 447. 1 Cr. 295 46 Ed. 3. 29. b. pl. 24. Had it been on Recogn. in the Court it ought to name the Ter-tenants.

Suggestion. 1 Cr. 514.

Cave *against* Mering.

(15) The Defendant promised in consideration that if the Plaintiff would consent that the Mortgager shall assign an Indenture to the Defendant, he would pay to the Plaintiff, &c. And it is alledged that ad tunc & ibidem the Plaintiff consented without notice, and good. 2. The Consideration was that the Plaintiff should consent to the assigning of a Lease, which by Windham & Curiam, the Plaintiff having possession of the

Notice.

Consideration.

Indenture as Mortgagee of B. A. Estranger is a good Consideration, because the Lessee without the consent of the Plaintiff cannot make Assignment, and so the Defendant hath a benefit and the Plaintiff prejudice thereby. But by Allen for the Defendant, If the Lessee had never assigned, yet the Plaintiff had been bound by his Consent, which is of no operation of it self, because he may yet keep the Indenture in his hand: But yet per Curiam, hereby is an Influence to make the Bargain better, and therefore it is good: Judgment, Nisi.

June 17. Nuttal *against* Page. Ante 50 pl. 6.

(16) WIld Serjeant for the Plaintiff moved for Judgment on Cr. Ball & Beggarlies Base, and Verson *against* Goodday, That he could not be in Newgate unless it be for Counterfeiting the Kings Great Seal; and this implyeth that he hath Judgment to be hanged, Trin. or P. 13 Car. C. B. Ireland *against* Booths. It was ruled to the contrary: and so in 1 Cr. 331. cited by Norton to the contrary. Justice Twisden and the Court agreed that this is a direct Affirmation, and what Seal soever it be, it is Felony, 1 Mar. 1. & 2 Cap. 6. Judgment pro querente.

Walcot *against* Tappin. 1 Leonard 201. pl. 280.

(17) Simile. IN Action upon the Case on promise that in consideration of 20 s. the Defendant promised to give 20 l. if Ch. Stuard should be King of England within a twelve Month. Scroggs moved in Arrest of Judgment, because that this doth imply that he was not King at the time of the Promise; as promise to a married Man, that if he be married within a Month, &c. this is void if he be married to a second Wife, but the Court seemed for the Plaintiff. Post.

Post 65

Stratford *against* Bateman.

(18) 2 Inst. 340. 1 Cr. 446. AN Action upon the Case against the Sheriff for taking insufficient Bail, because that although (as 10 Co. Beaulages Case) the Sheriff be bound to take Bail, yet that is meant of sufficient Bail. But by Twisden, He is Judge of the Sufficiency. Jones prayed, that the Party being in Prison, the Court would stay Proceedings, which yet the Court would not do, because it is after a Writ of Enquiry awarded.

The

The Town of Orford.

KEeling Serjeant moved for quashing of an Order of Sessions at Orford in Suffolk, because they cannot levy a Tax for any new Bridge nor for an old one of Money, but only by way of Issues and Distresses; also the Way might have been repaired for less than the Bridge newly made. And by Justice Twisden, This is no Bridge within the Stat. 9 H. 3. but only the Reparation of the Way by this amendment as a Wear, which only remedies the defects of the sinking Sands, which the Court agréed, and that by By-law of the Majority of the Inhabitants a Tax of Money may be levied, and that if the Majority be for repair, the Justices may compel particular persons to contribute Money, whereupon they refer this to be finally ordered by the Justices of Assize. (19) Ways.

Windsor *against* Saywell.

IN Ejectment Special Verdict find, Sir Arthur Gorge seized, and so being he was utlawed at the Suit of the Lessor of the Plaintiff who had Judgment before against him; whereupon after a Seisure on the Utlawry he extended on his Judgment, no amoveas manum being sued. Also the Defendant had levied Fine of the Lands before the Seisure on the utlawry made, which was only in personal Action. Jones for the Defendant, The King by this Utlawry is as Com. 541. 9 H. 6. 20. b. Partner of the Profits only, and his interest continued only so long as the interest of the Party in the Lands, 21 H. 7. 7. which is gone per mort ou Feoffment. 9 H. 7. 21. Stanf. Prærog. 57. but the course of the Exchequer hath been contrary. Yet this is intended after seisure, but before he may defeat the Kings Interest. And in Pickerings Case, 24 Car. 1. in the Exchequer it was adjudged, That a Bargain and Sale made after the extendi facias awarded, and before the Execution thereof, had it been inrolled, had been good, but it was inrolled after the Execution, and therefore would not bind the Kings Interest. But it was agreed, that if nothing be done, the Kings Interest might be discharged, and the Court conceived this Difference to be Law. Sed Adjornatur, (20) Prerog. Goldsb. 180. pl. 115. 9 H. 3. cap. 32. Prerog. Br. 38. Lee 17 pl. 17.

Sheffield *against* Morris.

(21) Error. IN Action upon the Case on non Assumpsit pleaded, Judgment is given for the Plaintiff at Hereford, and the Defendant assigned the general Errors in the Judgment, &c. and after special Errors were alledged; 1. That Ven. fa. is of xii. at Hereford, &c. without more, which the Court ruled to be no Error. But 2. it is, That the Court awards, and doth not say who in certain. 3. It is capiatur pro misericordia, for which it was reversed: But it was moved for the Plaintiff, that the Error being directed to the Mayor only of a Record quod coram vobis, it was ill, but per Curiam, this is the usual course, and not quod coram te, &c.

Glimston *against* Audly.

(22) Covenant. IN an Action of Covenant that he was seized in Fee at the time of the Bargain and Sale without Condition or Limitation, &c. And the breach assigned by the Plaintiff that he was not seized in Fée, which by Wild on Demurrer is not good, without shewing in whom the Estate was. 2. It was said that he was not seized in Fée without Condition, which is not good, because that the Condition or Limitation is not answered. Allen for the Plaintiff, That this is a direct Answer, and he is not bound to shew in whom the Estate was, to which the Bargainer only is privy, as 9 Co. 61. Also his Replication could have been only that he was seized in Fée, and not absq; hoc, that any Stranger was seized, which Twisden agréed, on Yelverton. And if it was a good Covenant that he is seized in Fée, and that he saith farther without Condition or Limitation. This by Windham, is superaddition, that he hath a good Estate in Fee, and doth not qualifie or alter the Fée. And the Plaintiff cannot take Issue that another was not seized in Fée without Condition, but the Condition must be shewed by him that pleads that he was seized in Fée, confessing it, but that it was on Condition; for it was the Folly of the Covenanter to make such a Covenant. And Twisden conceived, That to alledge that he was not seized in Fée is a good Plea, contra by Maller, Foster absente. Adjornatur.

Cooke

Cooke *against* Morgan.

IN Debt upon an Obligation made to the Plaintiff as Bayl for security of the Appearance of J. S. the Defendant pleads non damnificatus, the Plaintiff replyes non comparuit, and the Defendant rejoyned that no Latitat issued forth. This per Curiam is a Departure, but notwithstanding the Bond the party might have averred, as in Birches Case, that there was no Latitat. But by Wild, That is intended in an Action brought by the Sheriff himself; and not between other parties, which the Court agreed on Demurrer to the Rejoynder, and gave judgment nisi. (23) Departure.

West *against* Wrathband.

IN Debt on Award that the Defendant shall pay Money and also grant Annuity to the Plaintiff for his Life and the Life of his Wife, and that the Defendant do secure by Lease to the Plaintiff, and that thereupon the Defendant upon the request of the Plaintiff shall carry his goods, &c. And upon performance of all to give general Releases; this by Wild in Arrest of Judgment is ill, because the Request of the Plaintiff is uncertain, and the Releases by the parties are not to be made untill all is performed, which is no benefit to the Defendant; for by Stroud on the same side, the payment is to be made during their two lives, and the Release cannot be made before all be performed, and so the Plaintiff is not obliged. Windham, Super performationem of the Award shall be intended by giving of Security, and not by Payment so long as they live. Also the Tender by the Defendant to carry, is good performance in Law, if the Plaintiff do refuse it: But Twisden doubted, because that the breach may be assigned in the non Payment or for default of the Security; and also because it is not shewed what interest the Defendant had in the Lease, and because that the Defendant may tender when the Plaintiff hath no occasion or convenience. But by Wild, The Release is to be of all matters untill the Date of the Release, which he conceived would be a Discharge of the Annuity, and therefore that it could not be executed, but that the Annuity must be determined; and this was the intent of the Arbitrators, which, by Windham, is nothing to the purpose, for this Release will not discharge the Annuity. Adjornatur. (24) Arbitrement.

(25) June 18. Usher *against* Bushler. Ante.

Trespass. Hetly 50. of a Greyhound Kell. 203. r. per Shelley: Trespass of entry into a Mannor, and taking Escripts, not saying sua, or out of his possession, good. 1 Ed. 3. 23. b. pl. 112. 11. Quere of Trespass de bonis & catallis without saying (suis) after Verdict. Quare Equum cepit a persona del Plaintiff, is not good, unless he say (suum) after Verdict. 2 Cr. 46 pl. 16. & yet for breaking the Park & taking feras suas is good, 5 Ed. 3. 62. b. pl. 102. &c.

Wild prayed Judgment in Trespass of Goods upon Sir Fr. Vincents Case, 1 Cr. & Pell *against* Lemon, Trover for a Spaniel, which was here on Error on Judgment on Demurrer in C. B. given that it was good; that it was so a Fortiori in Trespass of Goods taken out of his possession; which as in 3 H. 6. 55. b. pl. 34. in Property, Br. 4. being after Verdict shall be intended sua, as in the Case of Swan. Twisden, Quare Warrenam fregit, 1 Cr. 554. Et Cuniculos suos cepit, it is good. And in Trover for such goods if the Defendant demur, is good. So Sir Rich. Fines Case, and Spencers Case, Dy. 306. b. pl. 66. and 1 Cr. 18. 89. Trover and Trespass in this differ not, both being of Goods; which as Bulstr. 95. after Verdict will be good, as well for taking away as for killing his Hawk. In the Lord Lindsey *against* Hudsons Case, Quare Cervum cepit, by one Judge it was adjudged for the Plaintiff, being moved in Arrest of Judgment, 43 Ed. 3. 44. Windham, Quare Pisces suos cepit, in libera piscaria, after Verdict was agreed naught in 1 Cr. 544. and so here: to which Opinion upon 16 Ed. 4. 7. 30. the others inclined. Adjornatur.

Heath *against* Pager. Ante 24 pl. 70.

(26) View.

After demanding whether the Jurors had had the View, they were sworn: The Title was made to two Offices of Custos Brevium & Recordorum, and Clerk of the Writs and Treasury except the Writs of Nisi prius. And in Evidence to the Assize it was observed, 1. That it needs not be proved that the Chief Justice hath Power to grant these Offices, but the Court will take notice of it. 2. Whether, as 1 Cr. 198. a Grant by Patent, though void, be not a Surrender of the Office by Writ. 3. An Admittance of any Clerk is matter of Record, and without that, the Court will not take notice of the Fact, Dy. 2. 3 Ph. M. Fancies Case. 39 H. 6. though the Record be lost. And 4. It is not sufficient for admittance without a special Entry of it on Record; for the Admittance is by the Court, though the Grant be by the Chief Justice: But by Keeling, A Man may prove a thing recorded, though he cannot prove the Record it self. 5. The Entry of a Record of Proclamation avails not if it be not under the Great Seal: Yet by Serjeant Keeling for the Plaintiff, This is only the Warrant of the Sheriff, but the Entry among the Records in Chancery is the Authority, which may afterwards be

exemplified. 6. A Writ is necessary to an Adjournment, because the last Proclamation of the Term is hither, which cannot be altered by word, only by the removal of the King, for the Kings Pleasure cannot be declared but by Writ, because by Twisden, it is not the King, but the Court that adjourns: And so are all the Presidents since 4 Ed. 4. and thus hath been the Law (viz. the usage of the Court) which the Court agreed: And that before Magna Charta the Kings Bench had Conuzance of real as well as other Causes. 7. Admittance to an Office is no Grant, by Windham. 8. The Copy of a Record ought to be brought into the Court by the Officer, especially being a single Parchment and not bound up among the Rolls; and because the Officer would not come without Special Command of the Court, which they would not send, thereupon the Proclamation was disallowed. 9. Offices may be divided ad libitum of the Chief Justice, especially the Course having been so of long continuance. 10. The Admittance ought to have been in Court, and it doth not appear that any Court was held in Oxon, because no Adjournment is made thither; and on full Evidence Verdict for the Defendant. Dy. 355. pl. 17.

June 19. Dr. Witheringtons Case. Ante.

Finch moved to stay the Return of the Mandamus, because the Name of the College was mistaken, being certified by the Master on his Oath to be so. The Writ was to the Master or Custos and Fellows, whereas their Names was Master Fellows and Scholars. Allen for the Plaintiff, The Name of Corporation, Boldstr. 189, 190. is not necessary in the Writ but only such persons that have the power of making a Return. But the Indorsement of the Writ was by the Name of the Custos Collegii infra script. which by Foster Ch. J. and Twisden, is an Acknowledgment of the Writ. And per Curiam, This is a great Affront to the Court, being after so long delay. And by Windham, the Writs are according to the Powers, though if it be directed to the whole, and mistaken, that is void. Adjornatur. (27) Return.

Smith *against* Warner, Ante.

Powis moved for Judgment, that false Latin after Verdict is not material, as Trover de eriis instead of ereis, H. 12. Car. 1. Williams *against* Taylor. Wild for the Defendant moved another Exception, That it is said unum ferrum, Anglice a Fire-grate, which is ill, because there is a proper word for (28) False Form. Stiles 19. pl. 46. Trover.

Yelvert. 25. pl. 5 for a Fire-grate. Twisden, If there be no Latin word one may be made with an Anglice, but not by general terms: As
3 Cr. 307. pl. 8. unum Instrument, Anglice a Horse-cloth, is ill, though Angl. a Pedigree 11 Car. hath been ruled good; and so when the words before Angl. doth describe it particularly, as unum Instrument pro tormento, Angl. a Spanner for a Gun, Stiles, Barker *against* Marten, ruled good. De instrumento magno de ligno, Angl. a Skreen, ruled good. Pro tribus ornamentis pro capite, Angl. Coifs, ruled good: But this case being de ferro igneo, with an Angl. it was held good; as pro instru-
1 Cr. 554. mento ferreo, Angl. a Jack. 3. Wild said, That a word for which there is a proper Latin, cannot be expressed by an Angl. but that was over-ruled by the Court, being after Verdict.

(24) J. S. is with Child with a Maid, which was penal heretofore,
Slandre. and now confirmed by the Act of Judicial Proceedings: And at another time, J. S. is brought to bed of a Child on 2 Cr. 199. this was held clearly Actionable at C. Law per Curiam. But in 2 Cr. 473. 5 Car. Rot. 322. Lightfoot *versus* . . . . She had a Bastard in Devonshire adjudged not actionable, but the words shall be taken in the common sense: And of a Physitian, That he is a Quack-salver, which signifieth a Quick Healer, yet for the common acception adjudged actionable; and Judgment for the Plaintiff, nisi.

Tipping *against* Grover.

(30) IN Debt against Lessee of Tythes for years (by the Executors
Rent. of H. Lessee to H. and his Heirs of a Rectory, for three Lives
2 Cr. 554. pl. 16 &c. 2 Cr. 112. 453, 454. rendring Rent on Tr. 37 Eliz. Buskin
3 Cr. 636. pl. 33. *versus* Edmonds, it was said this is a good Rent, and not
1 Leonard 333. a Sum in gross, and that a Demand is necessary to make void
By 31 H. 8. cap. such Lease, and so it is incident to the Reversion, but per
1. Patentee of Curiam, it is gone by the death of Tenant for anothers Life;
Rectory may there being no Occupant of Tythes, unless as joynt with a
enter, quere of Rectory: And therefore by Jones for the Defendant, Here the
Debt for Tithes Executors shall not have the Rent. Allen for the Plaintiff in
Moor 528. &c. Jewels Case, it is resolved that Rent upon a Lease for Lives
Moor 778. pl. shall go to the Executors, and not to the Bishop or the Heir,
1078. Inst. 47. and so should it do in case of a Lease for years. And
See Poult. abr' though it be said spectant Rectoriæ, yet when the Lessor hath
tit. Rents, §. 3. nothing to do with the Rectory, yet the Heir shall not have the
Rent hors de E- Rent, for by letting the Tythes they are severed from the Re-
glise is not di- ctory, and so by the death of Tenant pur auter vye; only the
strainable, H. 45 Ed. 35. per Cheldren.

Con-

Contract remains, but the Rectory vanisheth, which the Court agreed. Jones, Such a Severance for years will not amount to a full Severance but only if it had been for Life, Windham, It is said that the Lessor was seized of the Tythes, which are part of a Rectory, and not only incident to it; and of them only an Occupant cannot be. But a Rectory is like a Manor mixt, and an Occupant may well be of that: And when Tenant pur auter vye makes a Lease and dyeth, this determineth his Interest but not the Lease. But by Twisden, This is the Act of God, and so may determine the Lease, but not so of a Surrender. And the Court agreed Dentons Case in 2 Cr. 111. pl. 10. put by Jones, That a Lease for years is good of Tythes, but not for Life by such a Tenant; but yet that the Rent should either follow the Reversion, or shall be extinct, being by Act of God or of Law: but otherwise if the Lessor had surrendred, there the Rent had been absolutely gone; and after the Plaintiff, Executor of Tenant pur auter vye discontinued the Action. And by the Court, This is a good Case for a Reader of an Inn of Chancery.

Occupant cannot be of Rent or Copyhold, Noy 47. pl. 189, Salter & Butler.

De la Bar *versus* Gold. Ante. In Debt Br. 79.

JOnes for the Plaintiff taketh it as admitted, as Hob. 116. That Forbearance (whether the Party had cause of Action or the other benefit by it or not) is good: and it is sufficient that there be but either Benefit to the Promisee, or Damage to the Promisor. Personal considerations, as of Blood, &c. are not applicable to others, but other Considerations are. B. R. H 24 Car. 1. Rot. 1010. Disborn & Donaby, Consideration that an Estranger at his request had transferred his goods to the Defendant he would pay to the Plaintiff, this on Error adjudged good, P. 28 Eliz. Meggots Case in the Exchequer, in consideration that Estranger had enfeoffed the Defendant at the Plaintiffs request, the Defendant promised to enfeoff the Plaintiff, and adjudged good, Stiles 296. pl. 643. in Tr. 1651. R. R. Rot. 1071 betwixt Starkie & Milney, In consideration the Plaintiffs Grandfather had given to the Defendant, &c. (44 Eliz. 3 Cr. 849. pl. 3. Rippon *versus* Norton, Yelverton 1.) And Thomas *versus* Green, in consideration that J. S. would surrender to the Defendant, he would pay to the Plaintiff, &c. and ruled good, because being a Promise all at one time, all such parties will be intended to be present and consenting. Allen for the Defendant relyed upon the Difference where the benefit of the Consideration redoundeth to a Stranger and when to the Party; and here, if any man should have

(31) Assumpsit. 1 Cr. 273.

Stiles 461 pl. 1030.

1 Brownl. 49.

have an Action, it should be Luke Wood and not his Lessor, who by Windham, was but Agent for the Plaintiff, but yet the Lessee of Wood is not at all concerned in the Lease betwixt Gold & Wood, on the part of the Plaintiff by Allen: And by him Donabys Case was upon delivery of Goods by Executors to the Defendant, for which he was sued by the Plaintiff for them, and so he had a Benefit by it, but here the Defendant hath no Benefit; for Wood to whom the Money is due is better entituled to it than the Plaintiff, who is not concerned in the matter of the Promise, which is most considerable in Action upon the Case upon a Promise. Windham, If the Promise were in consideration that A. hath sold Goods to B. he promiseth to C. 10 l. C. hath no Remedy because he is but as an Attorney of A. to receive for his use; and A. only can have an Action upon the Case against B. for not paying the Money to C. But if A. sells to B. and B. promiseth in consideration thereof to pay to C. 10 l. which A. owed to C. in this Case C. shall have an Action because it appeareth the Interest was his: these Cases he cited of his own Reports in time of Rolls being Ch. J. And here the Defendant hath done an Act on the behalf of the Plaintiffs, and there is a Debt due for that which he hath done for the Plaintiffs, and so he may be entituled to the Actions. Twisden, In Donabyes Case it was said, that it matters not from whom the Consideration moveth, but who hath the Benefit thereby; which was said per Curiam, then and so he conceiveth in this Case, that it is a good Consideration, because Gold owed Wood 10 l. for which Swinock sued Wood, and Attached the Money in Golds hand, upon which this Promise was made. And in consideration that J. B. was Bayl for J.S. at my Request, I promise to save J. B. harmless, this he conceived good. Windham on Evans against Jampney 24 Car. 1. where A. sold to B. a House, in consideration whereof B. promised to pay to A. and C. in Action upon the Case by A. and C. adjudged that it was no good Consideration to C. and so he said it was here. Allen for the Defendant, It doth not appear in the Declaration that Wood is to be discharged by the payment of this Money, for the second Lessee owed nothing to the Plaintiff. Windham, In consideration that Swinock will forbear his Attachment, implyes that he shall procure the Attachment to be discharged and forborn: And by Windham, The Consideration was only to pay such Money as was in Golds hand to the Plaintiff, for whom it was attached as due by a Stranger to whom the Defendant owed so much. Adjornatur.

H. cannot have Debt against B. on Obligation made to A. conditioned to pay to H. 3 H.6.26.pl.8.

1 Brant.15 pl. 34.

3 Cr.619.pl.8.

Poph.183.r. Com.30.b. 3 Cr.868.pl.2. Stiles 378.pl. 614. 2 Cr.397.pl.2. Owen 109. 3 Cr.387.pl. 10.

In

In Actions upon the Case on Escape, nor in Debt, which may be all over England, the Venue shall never be changed. (32) Visn.

. . . . . *against* Sir George Freeman.

IN Appeal on Appearance of the Appellée for the death of the Husband, the Plaintiff, counted in French; and after the Defendant demanded Oyer of the Writ and Court, which were by the Clerk read in Latine, then arraigned the Party, and after Issue the Prisoner was bailed, having joyned Issue without Exception to the Writ or Court, which Foster commended, 3 Cr. 69. pl. 22. (33)

Ante. 56 pl. 17.

Judgment was given on the Promise to pay Si Carolus foret Rex Angliæ, &c. That this is a good Consideration, though he were then King, if he so continued. (34) Assumpsit.

Collingwood *against* Pace. C. B. in Devizen Br. 76.

BRidgman Ch. J. argued, That the Issue, as L. Co. 80. 84. cannot inherit one to the other propter defectum, though upon Attainder, which is only propter odium culpæ, whatever was in the Ancestor may be left to the Issue betwixt each other, H. 11. Car. 1. Bradstock *versus* . . . . . and Hob. Dunkom against Wingfields Case, will not reach this Case (not that it is not necessary to name the Ancestor) for without him he cannot make his Pedigree by him, tho he may his Title, on 32 H. 8. cap. 36. and those Cases are grounded upon the Statute: But at Common Law it would not be so, but that the Heir taketh only by reason of the Right that falleth upon the Heir, and not only by reason of the naming his Ancestor, as 3 Co. 61. Also the Children by several Venters by a possessio fratris shall not inherit each other though Daughters be, who shall not hinder this Case, because there an intirety of Blood is necessary: But if there had been no Daughters, the Uncle must have named the Father, and yet the younger Brother who is his Heir shall not inherit. And Coke in this Case upon great Advise in Hobbies Case, held the same Opinion, who in this is much to be relyed on: For the Case is but that Sir J. Ramsey seized in Reversion having Brother an Alien, and a Son, English, deviseth to his Brother and his Heir, and this in trust to pay his Debts, and he conceived that it was the intent of the Deviser that he should take, but not a legal one, because the Son of an Alien is no Heir, though in propriety of Speech the eldest Son be (35) Alien. 2 Leonard. 70. pl. 94.

thereby intended. And Legal Forms may be supplyed where the Intent is apparent, as here, there could be no other Heir: And in the other Cases cited the word Heirs carried Limitations of Estates, as in Counden & Clerks Case, Hob. But here the word Heir is only a Designation of the Person, and so the Devise is only to Patrick the Nephew and his Heirs, and not to the Heirs of his Heir, for he could have none; but this it cannot be, and so it is void: As a Devise to the Heir of J. S. (J. S. being then alive) as in Wilds Case a Fortiori when the Devisor taketh notice of this Disability, and especially when there is no Verdict in this Case, the party having described him only according to the Law, his Intent shall not have any other Construction: Tyrrel agreed with him, but Brown and Hide to the contrary. Post.

June 20. Chambers *versus* Nosworthy. Ante.

(36) Prohibition. The Rule for a Prohibition was set aside, being obtained by the Plaintiff after an Appeal by him brought where there are concurrent Jurisdictions.

The King *against* Warner.

(37) Felo de se doth not forfeit his goods as Heretick or Traytor Anei' Roberti Rec. Jud. lib. 1. cap. 12. p. 203. Wild for the Almoner cited Hales Case Dy. 261. Com. 258. That Felo de se is within the words (Murder) in the Act of General Pardon, 12 Car. 2. 11. being ex malitia precogitata and none can take advantage of this Pardon, the person being dead, and he can have no Administrators.

{42 Eliz. Day. / 19 Jac. / 21 Jac.} And all the Presidents of the Court are this way, Sub silentio.

The Inquisition was found after the Act. Twisden, No Indictment ever had the word Murdravit for Felo de se, which is a necessary Badg of Murder. But the Inquisition was quod voluntarie se ipsum suffocavit & murdravit. Keeling Serjeant for the Defendant, The King had only an inception of a Title, and no interest in the Lease till found by matter of Record, before which time the Pardon was made, which was a Release by the King. And an Exception is of a thing that without that would have passed within the General Words of the Act; and Felo de se is not capable of a Pardon, no more than he that commits Murder and dyeth before the Pardon, he shall lose nothing: And the issuing out of Process is only grounded where the

the Inquisition is before the Pardon, as 5 Co. the Archbishop of Canterbury's Case, which enureth not as a Pardon, but as a Release to the Executors of the Estate. Allen to the same effect relyed on the Negative Clause, that the Executors, &c. of any of the Kings Subjects shall not suffer, &c. but only for such Persons and Offences which are exprest in the Act, &c. but that it shall be effectual to all others, &c. and expounded beneficially for the party, &c. by a Pardon of Felons, Felo de se is not included, nor by granting the Goods of Felons, the Goods of Felo de se pass not. Nor ought this particularly described Murder to be excepted by general words, especially because the intendment of that Act was to bring the Offender to Justice, which cannot be here. And an hundred Presidents sub silentio, are not material. Finch pro Rege Com' is express, That ex vi Termini this is Murder, and the Intentions are guided by their proper words, and the seizing of his Estate is a sufficient Example, and publick Justice for deterring of such Offenders, and that is the same that is ordained in all such Cases of Felo de se: And it was never doubted before that the King was not hereby intituled. Windham, By the common Appellation of Murder it is intended of Murder of another person, and these are handled under distinct Titles and Names. And Parliaments have always excepted Murders, because it hath been doubted by Divines whether any Humane Powers can pardon the Offence, though the Law hath been otherwise; and this was a Law delivered to the Patriarchs before the Mosaick Law. And thus it is presumed the King would never pardon Murders by express Words, because hereby is aliquod periculi animarum, by contracting that Blood on themselves which they should put away by Vengeance against the Offender, which cannot be here, but only a Forfeiture; which is within the express words of the Act, and though it be a high Offence, yet it must be taken in the common sense, and liberally according to the Pardon. Twisden ad idem, That Murder is pardoned by all Supream Powers on Earth, and David did it, and by the Law the King may, 6 Co. Windsors Case, and here he hath pardoned the Person and Offence, and is not within the Exception of Murder. The Statute that saith, One shall not be essoined is to be intended by the Common Essoin, but not quia in servitio Regis: And the Presidents 4 Co. Slades Case L. 5 Ed. 4. sub silentio without Argument, are of no moment; and the Words of the Act of Pardon as of all Statutes shall be taken in the common sense: Mallet to the contrary, and Foster Ch. J. to the same effect, but both on the sudden they agreed the liberal Exposition of the Act,

but that such Crimes were to be depressed as much as may be; and this is as haynous a Murder as any, and is done rather to avoid the shame and loss of their Posterity. They denyed the difference betwixt the finding of the Title before, and after, for that the King hath a right fallen, and so nullum tempus occurrit Regi, though he cannot grant it before Office; likewise there hath been no opposition or grievance against so many former Presidents. Twisden agreed with the Ch. J. That if the King be intituled, the Inquisition avails nothing; and yet when the Kings Right is in him, by Windham, it cannot be pardoned, but must be granted though the King may pardon Murder. Adjornatur.

Sparrow *against* Chamberlain.

(38) Entry. THe Defendant having had a Verdict of too little Damages, would not enter his Postea but enters a new Action; whereupon Allen for the Defendant prayed that the Plaintiff might enter his Postea, that that Verdict may be pleaded as a Bar to the new Writ: and though there be Error, yet the Plaintiff thereupon may pray a nil capiat per billam, and so proceed de novo, and this hath been the Ancient Course to compel the Entry of it. Wild for the Plaintiff, The Court may enforce the Party to bring in his Postea, but not to enter his Judgment, which difference Twisden agreed on. . . . . *against* Trussell, and Lental *against* Andrews Case, which were accordingly: And the Reason of the Statute 2 H. 4. That the Plaintiff should not discontinue after Verdict, was grounded upon the same inconvenience; but by Wild, this was, because then no Plea in Abatement was left, which Windham agreed; and if the Defendant hath neglected to plead this in Abatement, it is his Folly, and he shall not now plead it in Bar.

1 Cr. 175.

2 Brant. 187. pl. 458.

Dr. Witheringtons Case. Ante.

(39) Misnom. Godbolt 44. pl. 52. FInch for the Colledge on Phelps Case and Estwicks Case in 1 Bulstr. said it ought to be directed to the right Name of a Corporation. Windham, Be it one or the other the Writ is good. Twisden, The Return is no such Corporation, which if true, is good, if false, an Action upon the Case lyeth; and therefore the Writ ought to be quashed because it cannot be executed, and every Corporation is of Record, and the Writ was filed, which could not be denied upon the motion of the other side, and yet the Return was waved afterwards. Adjornatur.

In

In Contract Br. 19. Entred Tr. 1659. Rot. 1460.

Manby *against* Scot.

AN Action upon the Case for Wares sold to the Wife of the Defendant after departure from her Husband, but desired that she might again cohabit with him, which he refused, and prohibited the Plaintiff to sell or deliver any Wares to the Wife, as appeared by Special Verdict, as also that he did allow her no Maintenance. Jones for the Plaintiff, That the Husband shall be charged, 1. Supposing her only as his Wife and this only for necessaries, yet he agreed the general Rule of the Books to be contrary, and that the Wife is but as a Servant, who without Assent, Precedent, or Subsequent cannot charge the Master; but the reasons hereof are, because the property of the Wives Personal, and the possession of the Wives Real Estate is in the Husband; and therefore it is but reasonable that the Husband should allow his wife Necessaries, for which Alimony by other Laws is allowed. And though the Wife be uncapable to contract, yet so is an Infant, and yet he may take up necessaries, and shall be bound by it, and so the Wife. Thus are Dy. 234. b. The Case in Parliament was adjudged, that Alimony was not allowable, because she might charge him at the Common Law for Necessaries. And thus was Tr. 22 Car. 1. Rot. 1651. B. R. Dent against Scot, wherein Judgment was given only upon a slip in pleading: But 11 H. 6. 30. by Marten agreed, that as to the merits of this Case an Action would lye. 2. Admitting this though here the Wife did depart against the Husbands Will, yet this will not hinder. So Yean against Brown in Guildhall by Roll given in charge, that a Wife might charge the Husband, because there may be many Unkindnesses betwixt them which the wife cannot prove. But if she lived in Adultery, then she cannot charge him, but here it is not found one way or other; and malum non præsumitur: And it is here found she was willing to come and live with her Husband, and therefore it would be great inconvenience that Husbands might so take away their Wives Maintenance. 2. The prohibiting the person to trust, is not of purpose if he be chargeable. 2. Baldwin for the Defendant waved all the parting and desire of return, because no Cause of it is found, and so the Court can say nothing to it but that the Husband is in general not chargeable on 34 Ed. 1. Debt F. 163. though it come to his use without an express authority, 22 H. 6. 29. by Newton, V. N. B. Debt is no warrant for this Case

(40) Bar. & Fem. 1 Brownl. 47.

26 H. 8. 2. pl. 2. A Contract (as Sale by Bar. & Fem of her Lands) can by no possibility be said the Wives Act.

1 Brownl. 54. pl. 328.

Case which came not to the use of the Husband: and 11 H. 6. is an Opinion obiter, but 21 H. 7. 40. by Fineux, Dy. 234. and F. N. B. 120. are full in this point; and Mich. 1650. in the Exchequer, Foxhil against Scot was so, though in this case there was nothing found that the Wares were necessary, and therefore a nil capiat per Billam. Also the Wife, as Rot. claus. 8 H. 3. Membr. 19. Freckfields Case, might have an Estoverio capiendo against the Husband; & quia nun vult maritus uxorem suam secundum legem maritalem tractare, he was excommunicated, and a Capias against him, and she had Estovers until the Husband should take her: And as 4 H. 3. Rot. Claus. Membr. 7. use her according to the Law of Marriage: And the Note in the Margent of that Roll was a Writ of Seisin pro sustentatione Uxoris. And 1 Co. 139. Great inconveniences would follow upon this Expence of the Wife as an encouragement to evil, &c. And this is but a new Devise to let in Alimony to the Common Law, and the Law doth presume the Husband will not use his Wife ill, unless she hath deserved it; and the Father for this cause is not compelled to allow his Son Maintenance; and it is better that some disobedient Wives want Maintenance, than that the Husbands should be thus forced to allow them. 2. This Prohibition (if the wife had lived with him) is sufficient to discharge the Husband, and nemo per delictum facere potest conditionem meliorem; and the Operation of the Law will not be stranger than the Facts against an express Disagreement, which as is said in 27 H. 8. 25. is to maintain a Contradiction, because it can never be presumed the Husbands Contract against his express Assent; and he could never have forbid every body, though he forbid these. 3. As this case is found, Judgment cannot be given for the Plaintiff, because the Declaration is of 90 l. and the Verdict only of 43 l. and especially because they find not what the particular wares were, that the Court might have judged upon them. And 2. They ought not to have found that they were necessary, but left that to the Court; as also they ought to have found what Trades the Plaintiffs were of, else are the Juries made Judges of the Law as well as Fact, 20 Ed. 3. 23. 40 Ed. 3. 15. b. & 9 Co. 74. Verdicts must be certain & that necessaries are to be judged by the Court appears, P. 9 Car. 1. Cr. B. R. Hastings against Duglas in Trover for a Sprig of Diamonds; and M. 27 Eliz. Moor, Burley against Hatton on Demurrer the same point ruled, and though it be suitable to the degree of the Husband, yet that is not sufficient, unless it be also suitable to his Estate, and what is convenient or not is always quæstio Juris, as also reasonable or not, 4 Co. 27. especially when the word neces-

Register 175. b.

Godbolt 215. pl. 307.

Godb. 168. pl. 99. Com. 7. b. Pleading Br. M. 21 Ed. 4. 41. Tryal Br.

1 Cr. 162.

neceſſary here is no more than convenient, and not neceſſitas naturæ or abſolute, without which ſhe cannot ſubſiſt; and on the whole he prayed Judgment for the Defendant. Twiſden Juſtice agreed, that the Court is to Judge what is neceſſary but it muſt be the Court before whom the Tryal is, and if any Jury give Verdict againſt Directions, a new Tryal will be awarded, and upon an Elopement ſhe cannot work but only to the advantage of the Husband, and therefore ſhe muſt be kept by the Husband. Windham, Debates betwixt the Husband and Wife are not to be brought to the Common Law, but are left to the Ordinary to whom it belongeth by the Ancient Common Law, Regiſter 34. That placitum de matrimonio with Teſtamentary Cauſes appertain to his Juriſdiction, though when theſe Juriſdictions were taken away men did endeavour to have Remedy at Law, the Ordinary did allow by Paternal care fitting Maintenance to the Wife, which we cannot do now: But by Foſter on Elopement, It is fitting and juſt ſhe ſhould loſe all ſuſtenance; and more of theſe Debates have been within theſe 20 years, than in 200 before: And 7 Membr. 4 H. 3. Of Katharine Pinkney was, that ſhe ſhould not extraordinarily grieve her husband, but ſhe may go to the Ordinary, 1 Cr. 17 Car. Drakes Caſe, & 1 Cr. 220. Pannel againſt Cramont, Alimony is maintenance for a Woman caſt off by her Husband, 2 Inſt. 434, 435. and recoverable in the Spiritual Court. Poſt.

Jnne 21 The King *againſt* the Inhabitants of Cheveny.

(41) Challenge.

IN Evidence to an Inqueſt it was obſerved, 1. The Iſſue being a way or not a way, a Juror was challenged, and being for the King, cauſe was ſhewed preſently that he had ſaid that it was a Way, and if it proved otherwiſe it would be a prejudice to the Country, which being proved, he was ſet aſide.

June 22.

(42) Extent.

UPon an Elegit nihil is return, if this be recorded a new Execution ſhall not go forth unleſs the Filing be procured by the Defendant. Poſt.

In Dett Br. 94. Robins *againſt* Warwick. Ante 42 pl. 111.

(43) Debt.

WIld Recorder, That the Action lyeth, elſe ſhall the Leſſee hold his Term without Rent, for the Leſſor cannot have remedy having no Reverſion: This is a Remedial Caſe,

Case, which shall be favourably construed, and differs not from the Case of Debt for an Annuity granted for years. And so is L. 5. Ed. 4. 2. Yelverton, Lucas against Fulwood, 208. & Bulstrod 151. And as in L. Co. 46. there is no necessity that the party that brings Debt should have a Reversion, but the Rent is reserved by reason of the Profits, as Dy. 127. And an Attornment is an Advantage for the Grantée, and an Agreement that the Tenant would pay his Rent to him; and in this Case the Court ought to judge according to good Conscience; wherefore he prayed Judgment pro querente. And Serjeant Sais being for the Defendant and absent, the Court would not delay their Opinion: But Windham was of Opinion the Action lyeth, and that on 5 H. 7. 18. The privity of Contract is incident to the Rent and passeth with it, where the Law fixeth the Duty it fixeth the Remedy and Privity, and this is made by the Attornment, which is necessary to every Grant; and it is not barely, and in its Foundation a Chose in Action as an Obligation, but is as a Shadow to the Body, and accessory to the Principal, and passeth as a Remedy in the Annuity. And the Opinion in Dy. 140. pl. 38. is but obiter, and hath been over-ruled; and this is not a Remedy de novo, as in L. 5 Ed. 4. 42. b. is said, but a supporting of an Ancient Remedy, as Lilingstons Case is, and as in 45 Ed. 38. When an Estate or Interest is determined then an Action of Debt is proper, because it depends on the thing granted, and not on the Inheritance. Twisden ad idem, Debt will lye for a Rent Charge granted for years, because the Agreement of paying the Rent is as a Contract betwixt them, being but for years; as L. Co. 47. and as in 1 Cr. 111. If it were a Rent out of a Fair, as 20 Ed. 4. 12. which is not good for Life, because no Rent can issue out of it, and yet by this quasi Contract it is good for years, 3 Cr. 895. pl. 13. in 44 Eliz. Benlos *against* Williams, And the reason of this difference is (Ognels Case) because that Freehold is in being in one Case and not in the other. In Leonards Rep. 441. which he commends, it is said, That the Ter-tenant shall be charged by the Contract of the Grantor and Grantee which is evident, because, as 32 Ass. 10. it was always subject to Debt, and there is no other remedy left, and it is no prejudice to the Lessee, as 9 H. 7. 16. 19 H. 6. 42. 7 Co. 39. And he affirmed that the Privity of Estate and of Contract remain by reason of the Attornment, as in a quid J. clamat upon a Fine, 4 Co. 49. which amounts to a real Contract in case of a Lease for Life, and personal in Lease for years, as 3 Cr. 637. Ard *against* Watkins. Mallet to the contrary in omnibus. Foster Ch. J. agreed, that an Action will lye for the Rent against the Grant-

3 Cr. 637. pl. 35. Moor 301. pl. 450.

Dent Lestat. 32 H. 8. c. 37. Grantee of Rents could not have had Debt against Lessee. Dy. 4. b. pl. 3. So is 3 Cr. 23. b. 41 Ed. 3. 16. b. pl. 10. per Frinchden, the Rent passeth by Grant of Reversion.

3 Cr. 3. pl. 7.

Grantor, not against the Lessee, who may be discharged of his Rent by the voluntary Grant of the Lessor (neither who) nor the Grantee have thereby any prejudice. No Man shall be charged for Rent but upon a Contract, which is not here either real or personal, which are inseparable, the one to the Person, the other to the Estate. 3 Ed. 6. Rot. 140. . . . . *against* Bosworth; and 1 Leonard 441. This is left a Quere, because there is no privity, for the Lessee is but as a Conduit-pipe to convey the Rent to the Grantee, unless he give any thing in the Name of Seisin that may charge himself with a privity of Contract. The Rent is reserved payable at a place certain, to which the Grantée by general words shall not come to demand the Rent, nor is there any Fealty incident to the Rent in the hands of the Grantée as there was in the hand of the Grantor. Dy. 206. pl. 9. Post.

Goodier *against* Clerke. Trin. 12 Car. 2. Rot. 1043.

(44) Leafe.

IN Ejectment Special Verdict find, That Bar. & fem. seized in right of the Fem having Issue W. C. for provision for Children made a Lease to J. S. to commence on the death of W. C. and his Wife without Issue Male; and after made another Lease and delivered it first: Then W. C. and his Wife died having a Son and a Daughter, by whom the Plaintiff claimed. Whereupon Serjeant Neud. for the Plaintiff on 1 Co. 62. conceived this Lease to commence on death without Issue is good, not only in respect of the Lessors, but of the Lessee also, and in both C. B. and here these two points were thus agreed, because it may be reduced to a certainty, and is to fall upon a common possibility as well as if it had been upon a Life. Also because by construction according to pleading when such a Tenant in Tayl, as 38 Ed. 3. 26 Dy. 14. 16. 349. 8 Co. 88. being Tail to him and his Issue male dyeth leaving a Son which after dyeth without Issue, now he is dead without Issue, So 27 H. 8. 13. 6 Co. Treports Case, and Damages F. 121. Dr. St. 80. F.N.B. 212. in a legal Sense: and the words of Conveyances have a more liberal construction according to the intent, as 21 H. 6. 10. 3 H. 7. 4. L. Co. 112. Leonard fo. 285. 30 Ass. 20. L. Co. 22. 5 Co. 29. which is plain in this Case: Here the Lease was made before the Conveyance, and indorsed on it, which maketh it altogether but as one Conveyance, which being for provision for Daughters Portions; as also that the Executors of W. C. should receive the Profits for 100 years in Trust for other purposes: and here is a Daughter unprovided for, she is in nature of a Purchaser upon a valuable Consideration,

ration, and so being precedent to the Conveyance of the Reversion, which was but voluntary, 2 Cr. 80. shall defeat it. And whereas it is objected, 1. That this would countenance a Perpetuity. And 2. Not to be defeated by a Common Recovery. And 3. Would introduce great Inconvenience by the late Contingent, which could not be intended for Provision for the Daughters; and being upon a Collateral Limitation, shall be taken strictly. To answer which on 1 Co. 85. 6 Co. 40. L. Co. 84. He conceived this a present Interest grantable, forfeitable, &c. and may be cut off by a Common Recovery, though neither by the Father nor the Son, which would have been a Contradiction of the Intent of the making; in all Marriage Agreements there are Intermediate Estates to preserve Remainders to the eldest Son. And Hains *against* Villers B. R. 2 Cr. 90. is, that it may be cut off by a Recovery, 8 Co. 96. 10 Co. Lampets Case, And no Purchaser can be deceived by the Lease because it is indorsed on the Conveyance of the Inheritance, Benloes Rep. the second Case. And though there had been no Daughters it were nothing to purpose to hinder the other Uses, the Heir having other Provision, 5 Car. 1. Keble *against* . . . . C. B. Rot. 3770. 5 Co, 35. The Lessee shall have Advantage of which of the Accidents first happen, Hutt. 119. as well as if it had been expressly mentioned. And upon the same Reason, Noy 132. That if Lands had been given J.S. so long as B. hath Issue Male, notwithstanding Infant born after the death of tenant in Tayl, the Tayl is gone, and the Remainder shall be revived. So here, & Meller *versus* Robinson in Mich. 4 Jac. B.R. 2 Cr. 395. Dy. 14. the Authorities to the contrary, P. 55. B.R. Southam *versus* Clerke, was considered in the C.B. and in Trinity Term after, that Case adjudged contrary. And in C.B. H. 58. Mustion *against* Clerke in a second Action there adjudged accordingly. Twisd. cited a Case of a Devise to J.S. on the death of J. N. without Issue, and J. N. dyeth, and after his Issue dyeth, that the Devisee shall take nothing, and so he said was Pell and Browns Case, Post. 74 pl. 51.

Dy. 330. b. pl. 20
Dy. 14. b.
Error Br. 175.

Windsor *against* Seywell. Ante 57 pl. 20.

(45) Alienation.

YArnton for the Defendant conceived that the King had good Title not to be defeated but by an amoveas manum. But by Twisden Justice, upon Conference with Hale Chief Baron; and on 9 H. 6. 20. he said, That it is the constant course to alien before any Seisin made, and so it is good, for the Utlawry is but a Contempt: but yet by Glin for the Defendant, It is first in time and the course of the Exchequer in many points contrary to our Books, as in Pickerings Case, and

in

in the Exchequer they would not allow this Elegit, because though a Fine conveyeth away the Interest, yet it shall not defeat the King of his Profits, which begins by the Award of the Writ of Seisin, and otherwise men may by dormant Utlawries avoid all Judgments. And by Wild for the Defendant, When Lands are seized, be it by a Writ awarded before the Fine or after, the Kings Hands shall not be removed without Writ, according to the Custom of the Court of Exchequer. But by Allen for the Plaintiff, When there is a Seisin virtute officii upon an Utlawry, as 9 H. 6. 20. 21 H. 7. 7. Stanf. Prerog. 57. This is discharged by Alienation a fortiori a Seizin by a Capias in manus, where there is no question to be made, but it will pass, because it is but a bare Pernancy of the Profits; and by him the two Judges in Pickerings Case, were divided, but upon mispleading agreed to give Judgment for the King. Glyn Admitted the Fine will pass the Interest in the Land, but not the Pernancy of the Profits, which yet he agreed by the death of the Party are gone. Adjornatur, to consult the Custom of the Exchequer. 76 pl. 49.

Dr. Goddards Case in Assize Br. 76.

(46) Mandamus.

ON a Mandamus to be restored to a Fellowship in the Colledge of Physitians, the Colledge returned that G. as the Writ supposes, is not removed, and therefore they cannot restore, against which Glyn excepted, that the Return in the main is ill, 1. Because they have not answered the Writ which supposes Dr. G. one of the Society, and turned out, which they agreed, but do not speak any thing of the Priviledges and Advantages which the Letters Patents of H. 8. giveth them. 2. They say that 30 persons (by By-law) whereof the President was to be one, were chosen by the Name of Fellows to assist in comitiis; This is a good By-law, as 4 Co. 78. to give an Interest and Priviledge to the Party chosen, although the Corporation commence within time of Memory: and they have shewed no cause but his Absence, without being called and Summoned to answer, which is no sufficient Return; and he may be unus Sociorum, and yet not enjoy all the Priviledges of it. 3. It was alledged that the By-law was made ea intentione, that the Persons should be present, but do not alledge any positive Rule laid upon them. 4. It is said that he was absent but do not say for what Cause. 5. They do not say the President had designed any Meeting or given notice of it, without which the person cannot divine when it will be. 6. They say they have put in aliam idoneam personam, without naming

him. 7. The Writ is directed to the President, who returns ego, which ought not to be, this being to him in his politick Capacity. 8. This is a Pleading, and therefore the word President is not good without the Christian Name. 9. They have alledged no Issuable Plea. Adjornatur. Justice Twisden absente.

159 pl. 181.

(47) Tryal. FOster on Motion put off a Tryal, because the Defendant was at Sea, and had material Witness upon agreement to cross examin the Defendants Witnesses; but Windham after in his absence denied to do so without Judgment given for Security, although the Attorney had no Warrant so to do, because it was the Defendants Folly to move to put off a Tryal, and not to be ready to give Security.

Lenit *against* Buxton.

(48) Prohibition. SCrogs shewed cause why Prohibition should not issue to the Mayor and Aldermen of London, because Execution was done for Debt upon the Plaintiff before any Warrant of Attorney was given to confess the Judgment to the Defendant; for which cause a Bill was by the Plaintiff exhibited to discover the Practice, whereupon the Prohibition was stayed until the Practice be examined. But by Allen for the Defendant, Practice is not material if the Court have no Conusance of the Cause.

Windsor *against* Saywell. Ante 74 pl. 45.

(49) Utlawry. FOster Chief Justice having been in the Dutchy with the Barons of the Exchequer reported, That it was all their Opinions, that before Seisure the Title of the King may be discharged by Alienation of the Party, whereupon Judgment pro querente nisi.

Stephens *against* Bretheredg.

(50) Discontinuance. Br. 38. Leonard 258. pl. 345. IN Ejectment Coke for the Plaintiff put the Case on the special Verdict that Sir Fr. Worsely Tenant for Life the Remainder to his Wife for Life, the Remainder to the Heirs Males of their two Bodies, the Remainder to Sir Francis his Son by another Wife and his Heirs Males, the Remainder to his right Heir; Sir Francis the Father levied a Fine with

with Warranty with his Wife, which by him doth not work any Discontinuance, and consequently no Bar to the Plaintiff, because the Wife hath no Remedy on 32 H. 8. or on 4 H. 7. cap. 24. being Party to the Fine; but she nor he was but Tenants for Life at the time of the Fine, and the Estate Tail not executed, and so could not be discontinued, as 1 Co. 104. 1 Instit. 22. b. where the Ancestor takes an Estate of Freehold, and the Heirs an Estate by the same Conveyance: So 40 Ed. 3. 9. And the Remainder to him there is executed, but not so where a Mean Estate is limited to another by the same Conveyance, as 27 Ed. 3. 87. 1 Inst. 281. And he relyed for this difference upon Lit. Sect. 578. the Consequence whereof will be, that by the Fine of the Baron & Fem they granted only their Estates for Life and in Tail, but doth not disturb the Remainder, because the Law will never make a tortious construct, where a good one may be found, 1 Co. 76. And here they granted only what was in them to grant, the Estate Tail first, and then for Life to prevent a Forfeiture, 10 Co. 95. Chenios Case, and for Dy. 339. pl. 44. There was only Estates for Life present, with an Estate Tail to one after an intervenient Estate, but here the Estate Tail is immediately subsequent to the Estates for Life. 2. The Collateral Warranty doth no ways affect the Lessor of the Plaintiff, because the Remainder was not displaced at the time of the Warranty. So 1 Co. 76. Bredons Case, L. Co. 398. Noy. 66. Kell. 79. a. L. Co. 388. b. Also the Estate to which the Warranty was annexed is determined, Lit. Sect. 741. and ought at least to have been avoided by Plea, because it doth only bind the Right, not extinguish it, L. Co. 372. a. nor give it, L. Co. 385. Arthur Treavor for the Defendant conceived the Entry of Sir Fr. the Son to be Taken away because the Warranty is descended upon him for which reason no Discontinuance can come in question; but whether or no by the joyning of Bar. & Fem upon 11 H. 7 c. 20. that the entry of the Heir be taken away; this by him extends only to the Heir of the First Husband, as 1 Inst. 365. and upon that this Question is raised, which in 1 Leonard 161. pl. 347. in Estwick & Ridges Case is resolved to be out of the Statute expresly: And P. 16 Jac. B. R. 2 Cr. 475. because till the death of the Husband the Statute operates not, 7 Car. 1 Cr. 244. Copland *against* Piat B. R. 15 Car. at the Assizes resolved accordingly. Twisden, The Wife here hath but an Estate for Life; but by Windham, & Curiam, A Gift to the Heirs of the Husband upon the Body of the Fem is Tail in the Fem: but here it is express to the Husband for Life and the Wife for Life, and the Remainder during their Lives not executed,

executed. Twisden, if it had been to his Heirs, agreed it, but doubted when the words are to the Heirs of both. Windham denyes 1 Inst. 365. b. to be Law, being over-ruled in Browns Case, 3 Co. 50. Adjornatur.

Goodier *against* Clerke. Ante 73. pl. 44.

(51) Lease.

WIld for the Defendant put the Case, That on Marriage to be had betwixt W. and M. it was agreed, that on their death without Issue male the Land shall be charged with 2000 l. for Portions of Daughters, in pursuance whereof a Lease is made to commence after the death of M. without Issue Male in trust accordingly, and after he levied a Fine to W. and M. in Tail, who died having issue, which after died without Issue; and he agreed this Lease good, as in Capels Case,, but subject to be dockt by the Tenant in Tail, nor is this Lease prejudiced by the Fine: But when this Lease shall commence is the main Doubt, whether upon the death, or on the failure of the Issue. And he conceived it shall commence immediately upon the death of W. and M. his Wife; otherwise that which is made on 1 Co. 156. one Contingent will be upon another, which depends upon the other; and hereof the Inconvenience would be great, because the Law will not admit of such dancing Estates that by Fractions shall rise and fall, Corbets Case 86. The Law fixeth on the most near Contingent. 2. This is the Grant of plain Men, as Hob. 304. and shall be taken in the vulgar and common sense, and not in any accurate Construction, 1 Cr. 102. Leonard 167. pl. 233. Dy. 361. Cradocks Case. The first day of the Term for Legal Acts is the Essoin day, but for Common Parlance the 23. Jan. Yelverton 149. Pool & Needham, 6 Co. Bishop de Baths Case. The 3d. reason wherefore he conceived the Lease determined then is, that otherwise Perpetuities would be favoured, which here can never be cut off by any Recovery by Tenant in Tail, and it may as well be for 1000 year. And 4. This is the very intendment of the Parties, as upon every Marriage Agreement, to provide for Daughters, and not to enrich the Executors. Twisden, The main point is only how the Party meant this dying without Issue, which the Court agreed. Windham, If it had been limited, that if H. had died without Issue J. S. shall have for 100 years, if having Issue, only for 50. This sheweth the critical time of having Issue or not must be his death. Foster Ch. J. demanded what difference betwixt from the dying without Issue, and if he dye without Issue. Twisden cited the Case of a Devise, that J. S. his Executors shall sell if he dye

So Lease for 20 years, if A. and his Fem or any Child of theirs live so long, is not gone till the death of all, as Leonard 74. pl. 11. & 2 Cr. 461. pl. 6. So had it been on the death of A. without Issue then living, all is one.

died without Issue male if he died, and after his Issue dyeth, yet the Executors may sell having but a bare Authority, and this he said was the nearest that he knew. Adjornatur.

(52) Mandamus.

Willmot excepted against a Return of a Mandamus directed to the Sheriff, because it was said that he hath only the Custody of the Records. 2. He sheweth that he is debito modo electus, Steward to the Sheriff of Notingham, and doth not shew how. 3. The Return mentioneth no Title under the New Sheriff but under the Old, by whose Authority he cannot keep the Records: But this being matter of Fact, must be admitted, per Curiam, to be true, and therefore the Return awarded good.

June 26. Prittiman *against* Dove.

(53) Contempt.

A Man shall not be in Contempt by non-performance of any Rule of Court without an Actual Service of it upon the Party, or left at his House.

(54) Tryal.

Nota. That in a Transitory Action when the Defendant would change the Venue (which is but in favour of him granted) he shall not be preferred when the Tryal stands in doubt, the Plaintiff being not able to bring his witnesses to one place, nor the Defendant his to the other, but the Plaintiff shall have his Election to trye it where he will.

Dr. Witheringtons Case. Ante.

(55) Return.

The Return being come in, Richardson prayed that it might be filed, which Twisden Justice said is not of necessity; but yet as Returns of Certioraries it may be filed without reading, but a Habeas Corpus ought to be first read, but of Favour they may read any Returns.

Hobs *against* Belcher.

(51) Error.

Error of a Judgment given in South-Moulton in Action on the Case for misusing a Horse which was lent to ride 20. Miles, by turning him out when he was hot: And by Baldwin all this was out of the Jurisdiction of that Court, being upon an Issue of not guilty. 2. The Judgment is, It is considered by the Mayor and Burgesses, and not per Curiam.

In

In Contract Br. 19. Manby *againſt* Scot.

(57) Bar. & Fem. Juſtice Windham waved all the Exceptions taken to the Verdict as not good; and for the main point he conceived, that this expreſs Prohibition will weigh much, but as to that Exception that the Jury have found, that they were neceſſaries, and ſuitable to her degree; which on L. Co. 56. reaſonable time (59) ſhall be judged by the Court. And in Haſtings Caſe it was found ſpecially, that ſhe was a Lords Daughter, but yet it being in a Verdict, it is good enough; though in Special pleading it ought to be aſcertained that Iſſue may be taken thereon: As upon tender of Amends the certainty muſt appear by Averment, upon which as the Common Courſe Bar. F. the Jury may find it reaſonable or not, and it lyeth in their Cogniſance ſo to do by direction of the Court before whom the Iſſue is tryed, and they may find it Generally or Specially at their Election as in all other Caſes. For the main Point that 11 H. 6. 30. by Martin is but obiter, and though ſome General Recoveries have been, yet none upon a Special Verdict: But it is an unſhaken Maxim, That the Fem, Cod. 5. tit. 16. l. 9. without Command Precedent, or Aſſent ſubſequent cannot charge the Husband for Neceſſaries, though ſhe hath been compared to an Infant: and it hath been ſaid that theſe things came to the uſe of the Husband. An Infant is capable of doing any Act for his advantage, and ſo is no ways like a Fem Covert. A Leaſe by him without Rent is not void as it were if made by her. She hath no will nor capacity, but is as a dead perſon without her Husband. Her Bond for neceſſities is a Nullity, and non eſt factum may be pleaded; her will is ſubject to her Husbands, and is his, and ſhe is as a Servant to his Maſter, a Monk to an Abby, &c. She is a perſon diſabled to any Act of Benefit to her ſelf or Husband, as 2 Cr. 617. Tracy *verſus* Dutton, nor needs there any notice hereof. 2. It is no Inconvenience that ſhe hath no Remedy at Law for a Livelihood, becauſe ſhe hath a better Remedy before the Ordinary, to whom the Law hath given a Paternal Care in ſuch Matrimonial and Teſtamentary Cauſes, and he may allow her Maintenance as anciently as any Law in Being what ever. And this hath been always practiſed by them accordingly, being eſtabliſhed in them by the Kings Authority, 1 Cr. 16. 1 Cr. 220. and though they do ſevere Acts, yet the Court will award no Prohibition, becauſe every Court is preſumed to do right according to their Laws and Cuſtoms, as 2 Cr. 364. And Alimony is with them in the proper Juriſdiction in the Spiritual Court, Regiſter 34.

Latch. 150.

3 Cr. 769. pl. 12.

2 Brownl. 118. pl. 21.

38.

38. 21 H. 3. Prohibition F. 31. Attachment on Prohib. 8. Upon a Divorce propter sævitiam, which is only a Mensa & Thoro, the Ordinary may restore the Goods which the Wife brought with her to her Husband, because these Chattels are incident to the main Cause of Matrimony, and he had cognizance of them by Excommunication only; but yet upon a significavit the King will imprison him till he hath performed the Sentence, and upon a Caution put in he may be discharged. And that President in 8 H. 3. That the Sheriff seized the Lands of J.S. is eo quod idem J. S. excommunicatus est usq; He takes his Wife & lege maritali illam tractaverit: So 4 H. 3 8. 18 H. 3. 10. And the Temporal Power came in Aid of the Spiritual, and the Common Law doth allow this Proceeding, being in Aid of it, and all make but one Compleat Law: and this is the most prudent way that a Reconciliation may be first had, if possible. 3. though the Wife do convert goods to the use of her Husband, he shall not be charged without his Assent, else might she build Houses with her Husbands Money; and Det F. 163. 21 H. 7. 40. Bread bought for the Houshold will not bind the Husband by Special Verdict so found without his Assent, which yet is easily intended by that general Authority that he giveth: as the Baily of a Lord, or the Purveyor Common, and the Abbe, but this general Authority is a good Evidence only of the Assent; and all the Books run upon this express Difference, 21 H. 6. 22. 13 R. 2. Annuity F. 50. 2. F. N. B. 120. 27 H. 8. 24, 25. And there is no Case but Men may find some Opinion for and against it in the Books, Arguendo Hob. 234. & Dy. 234. The very Gist of the Case was upon the Assent of the Husband, not whether he shall be charged, because the things were necessary; and that which staggered his Opinion was the frequent finding of it in Guild-Hall and here, upon which Recoveries have been had: yet upon consideration he found them consonant to the Rules of Law, being by Direction of the Court. And although she were enabled to take up Necessaries, yet not against the express Prohibition of the Husband, else would she be Judge of her own Convenience and Necessaries after the fact done, which is a Mischief like seizing Mens Estates before Conviction: it were more necessary and convenient to complain first, that it may be known in whom the Fault is; and so he conceived the Action doth not lye. 2. Twisden to the contrary, but agreed the Verdict well found in both points, her going away being not material, nor will the Husbands Prohibition be valid, because hereby were there but one Tradesman in a Town, he might by this means defeat her of maintenance: he agreed the difference put of spe-

cial and general Verdicts, as upon a reasonable Fine of a Copyholder, &c. by the direction of the Court. The Reasons why the Husband is chargeable are, 1. Because it is a thing of necessity, and that she must live is the Law of Nature, and the only medium is Food and Rayment; and because she hath no remedy her self, the Consequence must be that her Husband is chargeable; as I may throw another mans Goods over-board when a Boat is over-charged, 9 H. 7. A Lease by Infant without Rent is void, and a Lease by Husband and Wife by acceptance will bind her after her Husbands death. So Clare *against* De la Val H. 2 Car. 1. Rot. 521. And the Goods of a Monk taken up in Vacation of the Abbe shall bind the Successor, 13 H. 7. 3. And so 11 Co. 61. New Offices granted for necessary subsistence will bind the Successor of a Bishop. 2. The Law taketh all away from the Wife, which is a kind of Consideration for her thus to charge him. Trover may lye against Husband and Wife, which sheweth she may convert to his use, 9 Co. 73. And the Wife, as Coxe *against* May, 11 Car. 1. may charge her Husband for any wrong; they shall both be taken for her Trespass a fortiori, for that without which she cannot live. 3. It is no more than the Husband must have done himself; it is agreed the Husband must maintain his Wife. And 1 Cr. 16. is no determinate Opinion: For Alimony probably never was within Ecclesiastick Jurisdiction, because it is not mentioned, 24 H. 8. 12. in 9 Co. 9. in any old Books, nor in that Statute that takes away Appeals from Rome, He agreed that Matrimonial Causes are of Spiritual Cognizance as the Right of Matrimony, as unq; accuple, or Divorces, 4 Co. Bumtings Case, 7 Co. 44. and Bastardy General, but not of the Consequents, 48 Ed. 3. 18. 50 Ed. 3. 19. And Appurtenances of Matrimony, as the Age of Consent shall be tryed by the Common Law. And Debt F. 8. She must live and be maintained as well when she is single, as when married, and so that cannot be a necessary Dependant upon that Jurisdiction that Marriage is. Also the Spiritual Court cannot sequester the Estate but only Issue forth Process, the result whereof must come again to the Common Law, and therefore inutilis labor. The Presidents prove that the Common Law had care of it; but being of ancient time and not used, it is of little force, and the Assistance of the Secular Power was only to imprison the Person; as 4 H. 3. They could do no good to bind the Land; and the other Writ was an Habere facias sesinam after the death of the Husband upon a Gift in Fr. Marriage, as 37 H. 6. 14 and though they have Jurisdiction, they may allow Alimony; But 2 Inst. 492. not of necessity upon a Divorce prop-

Supra 150.

Hitch. 2. b. pl. 12

Hetley 95.

Process Br.

propter ſævitian (they need not) give Alimony at firſt dash; if the Husband ſhould abſent himſelf, ſhe will be without remedy. Alſo that Men may ſue in the Spiritual Court (ergo they cannot ſue at Common Law) is a fallible Argument, for ſome Cauſes are indifferent to both; and that Court, as M. 2 Car. 1. which firſt is poſſeſſed ſhall take the Conuſance of the Cauſe: as Annuity by preſcription out of a Vicaridge and Incontinency is not directly examinable here, but yet ex latere it may, as upon defamatory words, 21 Car. 1. Globeries Caſe, The Wife may bind the Husband to the Peace, and here it is not at all examined as this Caſe is in 1 Leonard Stone *againſt* Withipoll If it had not been neceſſary for her maintenance or Degree at leaſt it would not have lain: But as the ſame wind may lead to contrary Ports, ſo the ſame Arguments may be uſed ſeveral ways; yet this is the moſt convenient and prudent way, becauſe whatever ſhe doth will come under a ſtricter Scrutiny: Nor doth ſhe begin with Execution firſt, or is her own Judge, but the Court by whoſe direction the Jury find their Verdict; nor is there one Book contrary to this Opinion, Det 163. and all being of things not neceſſary, V. N, B. 62. is by a general Contract only, which without an Aſſent or Command will not bind, as 21 H. 7. 40. And of Poyns Caſe, Nothing is to be made without a Gloſs, which may be to any Senſe: The Authorities upon which he grounds his Opinion are, that Rolls told him there was no Law to compel Alimony in England, and ſo ſaid Glyn & Neudigate Serjeants, and Hutt. 105, 107. 1 Cr. 34. 139. Promiſe of payment by Husband upon Requeſt makes the Requeſt the Cauſe of the Action, and therefore an Action upon the Caſe would lye, which could not be unleſs there be a Duty; and likewiſe this Action is brought in (1658.) when no Alimony was allowable, which muſt be taken notice of, though it be an uſurped Power as to the ſuppreſſion of Right, which is by Force; but Acts of Juriſdiction ſet up by an Uſurped Power ſhall not be taken notice of, as the giving Cognizance of Alimony to the Chancery, which being taken away, ſhe may reſort to Common Law, wherefore he conceived that Judgment ſhall be for the Plaintiff. 3. Mallet ad idem, 38 Ed. 3. 1. Brief 644. 1 Cr. 358. 4. Foſter Ch. J. clearly agreed with Windham to the contrary, that the Action lyeth not, becauſe it properly appertains to the Spiritual Courts who have Cognizance of the Principal Cauſe. As a Solemn Vow made to God, which is the ground of their Juriſdiction, the Fem cannot conſent without her Husband, but hath ſubjected her Will (by her firſt Tranſgreſſion) to the Will of her Husband; ſhe hath no other Will, and ſhe is bound to know this,

As of Ancient time it was, 2 Inſt. 488.

Glanvil 43.

and is so much the more blameable if she do contrary. And Hob. 107. was grounded only upon the Promise of the Husband, because the Fem could not contract, as is expressed: And in Sir Marmaduke Langdales Case, the Cause of Alimony was 12 Co. 50. taken from the high Commissioners, and left to the Ordinary, because it is his of Right, that Judgment giving no new Jurisdiction. Also a Rationabile Estoverium will lye at Law, though it hath not been used of latter times; and these Causes are accessory, which follow their Principals, and there is no want of Presidents of Alimony during that time and before in Chancery, and the Inconvenience hereof will be much greater than can be of the contrary, and so he conceived the Action lyeth not. Post.

June 27. Ante.

(58) Tryal. By the Court the Rule as given by Windham was confirmed, and by a New Tryal the Defendant will have a Judgment for his Security, but no Execution till the Court be moved.

Dr. Goddards Case. Ante.

(59) Retorn. Wild for the College agreed to the Exceptions as invalid as this Case is, but one, viz. By the Act of Parliament 34 H. 8. there is none but Presidents Elect and Censors, but all the Commonalty are Socii, and so is Doctor Goddard as much as any man, and they only desire to be restored to the Place and Priviledges according to the Act and Letters Patents. The Writ is general, and doth not particularize any Priviledge, and therefore the College not bound to answer otherways; and the Thirty chosen by By-law are only called Socii by that, not by the Act of Parliament. And by Allen, this is but a Profit of being a Fellow, to which he cannot be restored alone without the Principal. Charleton Serjeant for the Doctor, The Writ distinctly requireth Restitution ad locum statum & previlegia unius Sociorum, which is a Particular Office, and however made is not material; but it being distinct from the Commonalty, and the Place being distinct, he cannot be expelled without being called to answer; and so he enforced all the former Exceptions that the Counsell on the other side agreed, but as not material here. Glyn the Kings Serjeant, The Retorn ought to have answered the Previledges and Incidents to the Place expressly; and by the Retorn it doth appear that there is a Priviledge to which the

See 22 H. 6. 10. An Assize lyeth not of Priviledge alone.

Doctor

Doctor was elected and chosen, and in which he had a Right and Freehold pro tempore. Finch for the Colledge, This doth not concern any Freehold, but a Priviledge occasionally made for convenience by By-law, for which no Writ of Restitution will lye, because it concerns no matter of Government or Legal Interest. Justice Windham conceived the Return good, because it doth not mention that the eight mentioned by Statute are only choseable out of the thirty made by By-law, but that the thirty were only chosen for convenience and consultation, of which the Court cannot take such notice as to restore him, because it appeareth to be but a Burden to him, as the Case in H. 7. And as their Election was voluntary, so might their Ejection. Justice Twisden ad idem, Restitution lyeth not for the Dividend of a Fellow or for Priviledges, only if he be not amoved from his place, as he that is removed from his being of a Corporation by By-law, is removed from part of his place it self, and in all agreed with Windham and Foster Ch. J. to the same intent, because no Reward or Fee for such Attendance and Consultation is due; nor are the eight necessarily to be chosen out of the thirty, but that they may augment or decrease the Number as they please; and so by all he was denied restitution and the Return ruled good.

Tomes Case. Ante.

HE was indicted for words spoken in his Sermon, That though the Great ones grin and shew their Teeth, yet the Faithful were more numerous: and he exhorted them to stand fast, for God would send his Angel to fight for them. And the Court conceived the Indictment sufficient; and Windham wished them more frequent, because though they do not talk Treason expressly, yet Tantamount. (60) Indictment.

Aleway *against* Roberts. M. 1658. Rot. 894. Dam. 852.

STroud for the Plaintiff, That the Heir of the Ter-tenant that died after Judgment, and before the Writ of Inquiry of Damages, and the other Tenants, &c. against whom Dower is demanded, shall answer Damages. The Fem brings Scire facias against the Heir (the Tenant in the first Action bringing a Writ of Error, whereby he suspended the Judgement, which was afterwards affirmed, and then he dying, the Plaintiff after Writ of Dower brings Scire facias against the Heir) She had actual Possession of the Land, but yet the Damages are not gone, because it is an Original and perfected before the Writ of Enquiry is awarded, because it issueth only upon (61) Scire facias. Damages shall not be assessed by the same Inquest on Judgment given by Defaults. 3 Ed. 3. 23. b. pl. 13. Dower F. 73. 3 Cr. 557. 14 H. 7. 25 pl. 5.

upon allegation of a dying seized. And 10 R. 1. Rot. 28. among the Records of the Roundhouse, Mandevils Case, Dower de virgata Terræ, of which her Husband endowed her, she had Judgment for her Dower but not for Damages: and at this day the Original Writ 11 Co. 40. b. is determined, in Trin. 51. Spitler against Farmer Stiles 290. pl. 634. where Roll then Judge, cited a Case, That Judgment of Damages was reversed, and the Judgment of the Dower held good because they are distinct Judgments: And the Sheriff needs not return his Writ of Seisin because the Original is determined. And Damages are only given by the Statute of Merton cap. 1. and were not at the Common Law. Lit. Sect. 39. In a Writ of Right of Dower no Damages is at this day. And Trin. 50. B. R. Zanchy *versus* . . . . And this Case is within the Statute, and that this Scire facias is well brought against the Heir and Ter-tenants, because Dower is one of the three Favourites of the Law ranked with Life and Liberty: and the delay of the Execution is the Parties own though in course of Law; yet when the Judgment is affirmed, the Court will suppose that Error was brought for Delay, 50 Ed. 3. 3. a. And if she should have it upon the Act of God, that had determined her own Estate a fortiori, when she hath her Estate continuing: And Dower F. 185. Unless such an Action had been well brought an Interpleader would not have been allowed, 17 Ed. 3. 67. b. 10 Ed. 3. 41. L. Co. 33. The surmise of dying seized, 14 H. 8. 25. may be either before or after Judgment, being only ex officio to inform the Court, and so were the Presidents upon search in the Com. Bank, the Seisin was awarded here upon the affirming the Judgment, and then a Writ to the Ter-tenant to know why they should not have a Writ of Enquiry, after which the Tenant dyeth in this Case. Pow is for the Defendant, The Ancestor Tenant of the Land in Tail made a Feoffment before his death, and after the Writ of Enquiry awarded he died, by which the Damages being not ascertained and only chargeable upon his person, are gone, 9 H. 3. 7. 20 H. 3. cap. of Merton, was made only to help the Defects in the Quarentine; the words whereof extend only to the deforciatores ipsi, not to any Feoffees: and because the Act of God hath determined that Writ and the Damages, of which it was the Plaintiffs own folly she had not Execution of before, and they are only given to the Woman in Recompence of the Trespass done to her in detaining her Dower, which is distinct from the real Action. And though Actio personalis quæ oritur ex contractu dyeth not, yet quæ oritur ex delicto moritur cum persona, as all Trespasses, &c. Dy. 271. 14. a. 12 H. 7. 22. b.

1 Ed. 3. 16. b. pl. 2. r. And that the Tenant against whom Recovery is had shall answer the whole Dower §. 1. and not every one for his time as Disseisors, Dammages §. 11.

1 Cr. 145. Costs shall be paid for such delay.

And

and the Realty shall not support it as annexed to it, because in all mixt Actions where the real part is determined, as 15 H. 2. 4. a. it shall not support the personalty, but every man in mixt Actions, 37 H. 6. 35. b. shall render Damages only for his own wrong by the Statute of Glocester, as in the 2 Inst. 284. and the Feoffees shall not be charged in Damages. Had the Damages been ascertained in the time of the Heir, that had been as a Judgment in debt to bind the Land, as Yelverton 112. Bromly *against* Littleton; and then should a Writ of Enquiry issue forth, yet the Feoffee shall not be chargeable here, because he cometh in after the Dower assigned, and had he come in before the Dower assigned, as L. Co. 33. and pleaded any false Plea, he shall be charged for the whole, because it doth not appear but that he is the Deforceor. Also if he doth not in a Writ brought against him plead specially, and shew that he hath been always ready, 14 H. 8. 25. Dr. St. 84. a. Issue F. 133. Dower F. 59. he shall be likewise chargeable, but in no case when he cometh in after Judgment, because he hath done no wrong. 11 H. 4. fol. ult. cited in Ognels Case, he hath no way to defend himself, and so nemo punietur pro alieno delicto, 26 Ass. 4. Damages F. 68. 102. and the Damages do not charge the Land, Libr. Entr. 226, 227. and so the Land shall not be extended for them. The Court conceived the only material Point to be the non-ascertaining of the Damages, without which the last Judgment alone is not such a Clogge upon the Land; but this resteth upon the first Judgment that the Land shall be charged, because that is a final Judgment, and is general, including both Land and Damages, which is only suspended till the ascertaining of them which are for the Seisin of the Husband. But by Allen for the Defendant, non liquet till the Writ of Enquiry returned, whether she shall have Damages or no. Adjornatur.

In Contract Br. 19. Manby *against* Scot. Ante.

WIndham said, That he had the Opinions of all the Judges and Serjeants of his House of Serjeants Inn in Chancery Lane with him, yet it was adjourned into the Exchequer Chamber, on motion of Allen, they being divided in Opinion before. Post, (62) Adjournment.

Barough

Barough & Button *against* Catlin.

(63) Admiralty. A Prohib. was prayed to the Admiralty in suit there, on a stipulation for Security made by Rule of the Admiralty in a Cause whereof they have Cognizance, but denyed because this is not questionable here as a Parol Agreement, though it be Collateral & Extrajudicial as to the main Cause, because the order is grounded upon that Agreement of the Parties, and because, by Wind. if a Prohibition should be awarded hereupon, all the Jurisdiction of the Admiralty would be defeated, 16 H. 6. and these interlocutory Securities are incident to it. And by Foster Ch. Just. This is for benefit of Trade, and so shall not be altered without great Advice, and so said Mallet and Twisden Justices; but by Twisden, If the Agreement had been to perform the Decree it had not been to be doubted, but if a Bond had been given for such Security it should have been sued at the Common Law. Jones for the Plaintiff, The Libel is in nature of a Scire facias upon the Security, which they will make in nature of a Recognizance, and so prefer it to a Judgment at Common Law, and this against Executors. Also it doth appear that the Party and Surety bound only themselves and not their Executors, and yet this is but Error, not cause of Prohibition, as if they will not, as 8 Ed. 4. admit of an allowance of the Precedency of Debts or sitting Pleas, as Modus decimandi, a Prohibition shall go. Adjornatur.

The King *against* Risden, &c.

(64) Justices. SHelton moved for quashing an Order of the Justices on a Forcible Detainer, because it doth not appear that there was any Forcible Entry. Yet by Twisden, The Statute of 8 H. 6. was made against Forcible Deteiners: But by Shelton, as Hitch *against* Nicholas 9 Car. 1. this Order is grounded only upon 5 R. 2. and no view may be upon 8 H. 6. but only an Inquisition; and thus are all the Presidents that the Party may be dismissed after the View without any Writ of Error upon the insufficiency of the Record: But per Curiam, The Indictment must be first removed. And by Twisden, A Conviction by view cannot be reversed but by Error, as Roll often said: yet Shelton who was Clerk of the Peace of Middlesex said, that it had been otherwise ruled in Blackwels Case, Trin. 1660. according as he before said in B. R. but by Foster, these Presidents were upon the removal of the Indictments, but yet they refused to bail the Prisoner. Post,

Jung

June 28.

(65) Appearance.

IF an Attorney without Warrant appear, this is a good Appearance as to the Court, and the Attorney only lyable to an Action: and so if such an Attorney mend an immaterial point contrary to the Rule of Court, that is remediless, though a contempt punishable by the Court.

Tows *against* Lewis.

(66) Account. F. 128. 1 Ed. 3. 3. b. pl. 10. And are destroyed by the Demise del Roy.

AFter Judgment quod competit on a Capias the Defendant came in, and is committed Marescalo on Manucaptors who are answerable for the Account, the first Bail being only for appearance, but yet shall not be discharged till the Party render himself on the first Judgment, though a Capias had not issued before the Bail can be charged, and yet the Court would only order the Bail to be filed, and leave the party to his Remedy according to the Condition of the Bail-Bond or Recognizance. Post.

(67) Bail. Execution. §. 5.

EXecutors on a Writ of Error shall not be forced to Special Bail, as per Curiam hath been often resolved, unless some Devastavit or the like appears.

Serjeant *against* Gibbons. Ante 23 pl. 67.

(68) Travers.

IN Debt for Rent the Defendant pleads an Assignment by the Assent of the Plaintiff with notice; the Plaintiff replyes he did not consent: and after Verdict for the Plaintiff Scrogs moved for Judgment on Renolds *against* Bulkly, Hob. The Issue is well, being upon a good Affirmative and Negative. So Kent *against* Hull, Hob. and a Verdict pursuant. So Nichols Case, 5 Co. and 32 H. 8. 30. doth fully help this defect, whether the Court be satisfied the Plaintiff had Title or not, which is not material; and though the Issue be upon never so frivulous a Point, the Judgment ought to be given. Allen for the Defendant, If the Plea is pertinent to the Declaration, though it be immaterial, yet the Plaintiff shall have Judgment, but not so when the Verdict upon such insufficiency of Plea it is found for the Defendant: and here Issue by the Replication is not offered upon the matter of the Plea, which was an Assignment by the Assignee with notice to the Plaintiff, and the Assent of the Plaintiff was but Surplusage, and so the Replication doth not answer the Bar, and

therefore there ought to be a Repleader. The Case of Reynolds was grounded upon the Verdict, which by finding an Entry doth imply an Ouster, which the Court agreed. And by Twisden, Where the Issue is good, as 1 Cr. 78. Hob. 76. to bar the Plaintiff of his Action, if the Issue be upon an immaterial Point, that is good, upon which the Court may give Judgment, but not so where it appeareth the Plaintiff cannot have Judgment, as in Debt on Bond, the Defendant pleaded per minas, the Plaintiff said he made it voluntarily without Duces of imprisonment; the Defendant rejoyned that he made it per Duces: Whereupon the Plaintiff takes Issue, and Repleader awarded, 16 Jac. and so in Jennings & Lees Case, Hob. 197. Godbolts Rep. 2 Cr. 585. Saltkacke *against* Thorn, because the Plaintiff cannot have Judgment. Windham also conceived the best way for expedition to be to Replead, but yet he said Reynolds Case is not answered, as Issue on sufficient repair of Hedges in Trespass tempore transgressionis, but not at the time of the Action; but here he said that the Issue is well enough. Mallet contra, the Verdicts shall be Favour and no Repleader here. Foster Ch. Just. That there shall be a Repleader, the Issue being immaterial; and for this reason were the words in the Writ of Error (or False Judgment) which was to leave it to the discretion to judg whether, notwithstanding the Errors assigned were not good, the Plaintiff had no Cause of Action on the whole Record. Adjornatur.

Welsh *against* Pilkington.

(69) Assumpsit. IN Assumpsit on consideration the Plaintiff would give time for payment of Money to him, he would pay, &c. The Defendant said that he did not give time to him. Allen moved for a Repleader before Verdict, Issue being taken upon non-payment to him, which is a Jeoffail; but the Court directed that he waved the Issue being in Paper, paying Costs.

The King *against* Long.

(70) Perjury. 1 Cr. 337. IN an Information of a Perjury made on Oath in the Chancery, Shires moved in Arrest of Judgment that the Oath is alledged to be to this effect, &c. which is uncertain, & Adjornatur.

(71) Notice. Notice on an old Issue must be for a Term before the Tryal if it hath continued above a Year: also Notice to one Defendant by the Course of the Court, is Notice to all.

Barwell

BArwell moved to quash an Order of Sessions for reimbursing of a Constable for Money laid out upon reparation of a Bridge on 22 H. 8. 15. because it is uncertain in what Hundred the place is, or where the Offence was, being no Presentment made expressly of it. And though the Justices may tax the Parish, yet not the Hundred; nor is a Constable bound to repair any Bridge. Also the Bridge is in two Hundreds, and one only is taxed, which by him is illegal; but the Order being after a Verdict, the Court will not allow such Exceptions against it as against Pleadings, and therefore they affirmed the Order. (72) Justices.

Opie *against* Wilkinson.

IN a Writ of Error of an Action upon the Case where it is declared that the Defendant brought an Action upon the Case, upon which the Plaintiff was arrested, not shewing the whole Writ, which, per Curiam, is the course of the C. B. and thereupon Diminution should be alledged and not demurred to the Declaration for that Cause; for had there been no Writ in the C. B. yet after Verdict the Judgment is good, because this Court will intend they had a Writ. Foster Ch. Just. said, That for fifty years the Writ of Clausum fregit, with Declaration in any other Action, as Debt, &c. in C. B. had been practised. 2. The Custom of London is alledged to be a Custom through all the Land, which is but a Surplusage, per Curiam. 3. The Writ is, De transgressione coram R. Foster & sociis suis, where the Plea is only before Foster, and Hide being present, but at the Issue Tyrrel was added to them. 4. A Misericordia is entered notwithstanding the General Pardon, which is well enough, but it shall not be estreated or affeared, for the Pardon doth not alter the Judgment but only taketh away the Penalty; and so is the course of the Court, per Curiam, adjornatur till the Prothonaries certifie their course, but a Capiatur is not entered at all. (73) Error. 1 Cr. 254.

Nota. That after one Elegit returned, they cannot have another Elegit without Continuances; but per Curiam, The course is not to make Continuances on the Roll, but Awards severally. And per Curiam, If nihil be returned he may have a new Elegit, but if but an Acre be returned, he can have no other. (74)

Amery *against* Bateman.

(75) Action sur Case. Deut. 10. r.

THe Sheriff returned Cepi Corpus, and hath not the Body at the Day; whereupon the Plaintiff, as 3 Cr. 460. pl. 8. Laughton *against* Gardener, the Party brings his Action upon the Case. Now by Jones the Sheriff cannot demur, because this is a private Statute, of which the Court will not take notice without special Pleading. Adjornatur.

(76) ON Plea of no Award made, the Plaintiff sheweth the Award and Breach of the Defendant by Non-payment of Money in Threadneedle-Street, which by Turner is uncertain: but per Curiam, it is not here necessary to shew the place, because no Issue can be upon the Breach, which were a departure in Pleading. But the Defendant must rely upon no Award made, as H. 23 Car. 1. Ken *against* Peeling, on Award to pay at or in the House, adjudged naught, because at and in are all one: But per Curiam, But where Payment is to be in the House of a Stranger, H. shall not be presumed to be able to perform it; but otherwise where the Payment is to be at the House of a Stranger.

Dett Fitzh. 7. Smart *against* Edsay.

(77) Scire facias. So for Damages on Rec. in Assize against 2. Execution. F. 81. 27 Ed. 3. 80. Seu. 4. pl. 7. is expres accordant L. Co. 386. b. The difference between the real and personal Lieu, and also the same in 3 Co. 14. of which see in Assets per Br. 15.

IN a Scire Facias against one Joyntenant surviving without the Heirs of the other on Judgment in Debt against both; this by Winnington is good at the Plaintiffs Election on 1 Ed. 3. 13. pl. 41. 3 Ed. 3. 11. pl. 37. because that where Ter-tenants are charged all must be named; but not so when any Party is himself, 29 Ass. 27. against whom the Scire facias is awarded, because this is a personal thing, for which the Execution at Common Law was personal. And this is but pleaded to the Writ, and therefore concluding in Bar to the Action, it is naught. Wild for the Defendant supposed the Land was not chargeable at Common Law, before Westm. 2. And by this Statute, as Langfords Case, the real Line is put all in the same Case, and the Judgment being Joynt shall never survive. 2. As to the Writ, that concludes only that he ought not to have Execution, juxta executionem Brevis; this per Curiam is well. Windham, The Difference, as 16 H. 7. is betwixt a real and personal Execution: And by Twisden, After the death of the Survivor he must charge all the Ter-tenants, which proves that it doth not survive, 29 Ed. 3. And Herberts Case. On a Recognizance the Plaintiff hath Election

on

on to take out a Capias, or Elegit, or Scire Facias, and yet when the Elegit or Scire Facias is brought, it must be brought against all, especially because the Bond is joyntly against two, and this Scire Facias is only to revive the Judgment, not to have Execution: And yet by Windham, he must joyn them both, because though he may take a Capias upon it against the Survivor alone, yet he may also take out a Scire Facias to have Execution, which ought to be against all, and therefore so ought the first Scire Facias to be, but Twisden doubted. Adjornatur.

The King *against* Spelman.

A Certiorari was sued out here and not delivered to the Justices before they had awarded Restitution on the Stat. of Forcible Entry, 8 H. 6. But before any Restitution was actually made upon their Warrant: And by Twisden, The Hands of the Justices are closed by the issuing of the Certiorari, though they be not in contempt for what they have done before the Delivery of it, but they ought to have awarded a Supersedeas immediately upon the receipt of the Certiorari, and because they did not, the Party had a Restitution. Nisi. (79) Restitution. Dyer 245. Yelverton 32. Moor 73. pl. 199. Yet after Office found and in Paper, though not engrossed, it came too late, Dy. 170. pl. 3 2 Brant 8. pl. 24.

June 29. Ante.

When Men are to answer Interrogatories in the Crown-Office, if they except against the Clerk of the Crown his Report, they must have the Interrogatories in Parchment present. 2. The Exception of the Act of Indemnity and Pardon, is of all Escripts and Writings, which doth not extend to the forging of an Alias Writ, which by Newdigate is a Record, and not within those words, Sed Curia contra. And Twisden said, that it had been ruled, if a Man be to give security by Writing, security by a Record is a good Performance. (80) Interrogatories

Blatt *against* Mole.

In a Replevin the Case was, A Copyholder makes a Lease rendring Rent, and after surrenders Parcel to the Lord, who avowed on the Lessee for part of this Rent without alledging Notice or Attornment by him, which should be aswel on Feoffment as on a Condition broken, else the Lord cannot avow, by Wild, sed Curia contra; And by Windham, The Lessee (81) Apportionment. Hob. 177. pl. 202. agree in omnibus. 9 Ed. 3. 8. pl. 10. So 3 Ed. 3. 25. pl. 19. &c.

Lessee is in Possession, and the Copyholder is but a Tenant at Will, and hath no mean to do this but by Surrender, and therefore an Attornment is not necessary: Also as Mallories Case, where the thing is penal, notice ought to be, but not so where it is only remedial, as Debt for Rent or Replevin, &c. Also the Copyholder hath no other place than the Court to pass his Estate, and therefore no such uncertainty as at Common Law. Till he is admitted Tenant he cannot distrain or bring Debt; and of the Court days he is bound to take Notice at his Peril. 3. H. said, That so much was arrear and unpaid, for which he doth distrain, and doth not say that quia the Rent a retro fuit ideo he distrained, yet good, per Curiam though the other had been more formal: Judgment for the Avowant. Nisi.

Surrender cannot present to Advowson vid. after as before he hath any admittance. 2 M' 158.§.1. Deut.41. pl.74. §.1. But the Heir is sufficient Tenant to take Surrender out of Court by Custom before Admittance.

In Error Br. 117.

(e2) A Warrant of Attorney given by Agreement of the Parties may be entred after the death of the Party the same day by compulsion of the Court, being in the Term, but not so where it is by Covin, yet per Curiam, the Judgment being acknowledged before the Judges before, although not signed by the Clerk with taxing of Costs till after his death, which by them is the compleating only of the same Judgment, though they conceive a Judgment without costs tared to be only erroneous, not void: But Hern Secondary to the contrary. And by Allen, The very signing of the Book by the Clerk is the Essence of the Judgment; and by the death of the Party before this, the Authority of the Attorney is determined. But by Windham, The signing is but only a Ministerial Act, the Original of which is in the Judgment of the Court, who notwithstanding the death of the Party may enter it the same Term, because the Act of the Court shall prejudice no Man. But by Twisden, The Court must pronounce the Judgment first, and then if it be not entred, the Party shall have no prejudice but on a non sum informatus, which is but the Plea of the Attorney, the Judgment thereupon is not before that the Book be signed, which is the Judgment of the Court. All agree, That if this were per Coven, it shall be avoided. Adjornatur.

Cookes

Cookes *against* Fowns.

JOnes for the Plaintiff, A Covenant that he is seized of a good Estate in Fee, the Plaintiff takes Issue by Replication that he was not seized of a good Estate in Fee: The Defendant rejoyns, that he was seized of as good an Estate as Sir J W who granted it to him, had; which by Jones is nothing to the purpose, because that he was seized of a good Estate, according to such an Indenture, refers to the Estate passed by the Indenture it self, and not to him that made it, which the Court agreed, and Judgment pro querente, nisi. (83) Covenant.

Palmer *against* Strotwick.

Siderf. 44. In Avowry Br. 37. (Sen. 38.) m'.

THe Question was, whether an Avowry being made for Rent Ao. 1661. shall be an Estoppel to an Avowry for all Rents due before: and by Jones, This is in nature of an Acquittance and Disclaimer, there being a Return habend awarded. Allen for the Defendant, who doth not avow but makes Cognizance as Baylies in both the Cases; and admitting that Judgment in the latter Avowry shall bar, yet it shall not do here: 1. Because it is betwixt them and other Parties. 2. The Arrears of the Master shall not be lost by the Servant, as Bredimans Case, without his consent; so Pilkingtons Case 5 Co. . . . and F. N. B. 71. Nor should his Acquittance have barred his Master, which the Court agreed. Sed Adjornatur. (84) Estoppel. H. cannot have Sc. fa. on Ret. awarded for Arrears after encurred, as in Annuity he may; nor shall H. have any former Arrears but barely the Rent for which he avows, 21 Ed. 3. 22 pl. 12. 2 Leonard 3. pl. 3, &c.

. . . . *against* Hartly.

UPon a Bail-bond the Sureties shall put in Common-Bail, unless the Court award the contrary, which they will not do without special Cause shewed. (85) Bail.

Weden *against* Baldwin. Ante 14 pl. 22.

ALlen for the Plaintiff, The Value of the Capite Lands is 10 l. per ann. of the Soccage 30 added by special Agreement of the Court and Parties; but by him this is not material, because if the Will be good it must be good for all the Soccage Lands, or none, because the Capite Lands cannot descend in point of recompence because he was seized only thereof (86) Devise.

thereof in Reversion after the death of his Wife: In the Stat. 32 H. 8. cap. 1. there are three Clauses, 1. That of Soccage only all may be devised. 2. That of Knights-Service two parts, and thereby that he that hath Knights Service and Capite may devise only two parts of the whole: and the Heir of Tenant only in Soccage shall not be in ward for his Land, but by Knights Service he shall be in ward for all his Land, Knights Service and Soccage: This Statute only extended to Estates in Possession, but 34 H. 8. came to explain that of Estates in Remainder; for which, as Lovies Case, one shall not be in ward at the Common Law during the Estate for Life remaining, Dy. Bokenhams Case: But here, because it is doubted whether by the Limitation of such Uses this be not the old Remainder, and so in nature of a Reversion for which one shall not be in Ward. But the point now in question was not disputed there, being taken as granted: And the main question is upon the 32 H. 8. 1. where Lands are given to two and the Heirs of one of them, whether here the Heir shall be in ward; and therefore this Estate shall be such an Estate that may by construction be said to hold of the King and to be Tenant to him, and therefore makes this Land also within the first clause, that only two parts shall be devised; but this is an enacting Clause intended ad unum, and shall never by construction be drawn to other Lands, or relate to any other Clause. Also Knights Service Tenure doth not by this Statute hinder men from disposing all their Soccage Lands as Knights Service in Capite doth. Also another reason is, That such a Tenant shall be in ward for his Body only, and not for his Lands, where they were Joyntenants in Capite to the Heirs of one who hath Soccage Lands, because the Statute doth only give the Ward of the Body and not of the Soccage Lands; and therefore by the meaning of this Act he may dispose of all his Soccage Lands; for at Common Law the King had Wardship neither of Body nor Lands, but only by this enacting clause he is entituled to the Ward only of the Body, and therefore such Tenant shall not be said to hold of him, which would alter former Clauses of that Law. Jones for the Defendant agreed, That if the Land be an Impediment to devise, the value will not be necessary, because the Knights Service Lands cannot make up any thing of a third part: and that it is an Impediment is apparent by 32 H. 8. cap. 1. §. 4. n. 1. The third Clause without which Knights Service could not have been devised, and by this two parts are allowed to him that hath an Estate of Inheritance, as the Defendant hath here, and the King by it hath Title of Wardship either at Common

non Law, as when the Tenant for Life died, the Heir should be in ward, 33 H. 6. 5. 28 Ed. 3. 93. 27 Ed. 3. 80. The Land is not absolutely charged but chargeable upon the Contingent death of Tenant for Life, and therefore it may reasonably be intended that such Remainder-man could not devise all away in the mean time, and defeat the King, or else by this Statute at least, that the King shall be intended to have this benefit, as a necessary consequent of the Kings advantage given him by the Wardship of the Body, which would be fruitless without such intendment; and all along this Act hath been taken for the Kings behoof, 6 Co. 76. And the nearest Case hereto is that of a Reversion, which is construed to be within the Statute, by reason there is a Tenure implyed, which is not material, the King being intituled to his Wardship. Twisden, He that is Joyntenant for Life with Fée Expectant, cannot devise in probability, at least within the Statute, which Windham agreed, Dy. 366. b. pl. 38. Adjornatur.

Cooke *against* Morgan.

IN Debt upon a Counter-bond for security of Bayl given for Appearance of the Defendant, the Defendant pleaded non damnificatus; the Plaintiff replyed non componit; the Defendant rejoyns, That the first Bond given was void by 23 H. 6. 10. and that there was no Latitat issued forth; this by Pemberton is no Departure, and also the Suit is only quia timet; the Execution on the former Bond will be had, which is no damnification, being, as it is affirmed by the Defendant, without reasonable cause, by reason there is no Latitat. And here the Rejoynder on 1 Instit. 304. Dy. 207. is not disaffirmant or varying from the Bar. As in 1 Ed. 4. 5. 21 H. 7. 27. but in Corroboration of it, 1 Cr. 387. And thus the rejoynder is here, because it could not have been pleaded in Bar without a Conclusion of sic damnificatus, which had, as in Com. 20. 20 H. 6. 16. 1 Instit. 303. waved the special matter which here is most properly included. Wild Serjeant to the contrary. It is said, that the Defendant was in the Gaol debita legis forma, and in the Bond whereby he is bound to the Plaintiff as his Security, the Latitat is recited, which is an Estopel to say this after against the Security, that there was no Latitat (otherwise it might have been against the Sheriff.) And 2. This matter is a Departure, because one cannot plead non est factum to such a Suit, but is lyable to be sued and arrested for it, which is Damages and just cause of Fear. Twisden agreed that here the party is concluded to plead this against the (87)

1 Cr. 350.

Bayl, and that the very non-appearance was a damnification, be the Bond void, or not, which cannot by special pleading be made void on the Stat. 23 H. 6. 10. §. N. in the Rejoynder: But by Pemberton, The Plea only mentioneth a Bond in which such a Latitat is recited, which is no Estople: But by Windham, The Defendant affirms, that the Plaintiff is bound for Appearance on the Latitat, and not barely recites it, which the Court agreed, and that the Bond is only voidable by Plea, because it supposes danger of Arrest by just presumption of Law. And by Twisden, This is but a recital, and shall not estop, but because this is a Damnification. Per Curiam, Judgment for the Plaintiff.

Tirry *against* Brown. Ante.

(88) Fraud. WOolmer for the Plaintiff, It doth not suppose that the marriage is fraudulent or without the parties consent, but it may be according to vulgar acceptation Fraud if it be done without consent of Parents, and no other Fraud appears by that Verdict. But by Allen on the other side, The Justices having judg'd it Fraud, this Court cannot alter their Judgment, being confirm'd by the Law of the times. But Twisden Justice doubted whether an Action may not be brought against the Justices on this Judgment, on refusal to refer it to the Bishop of the Diocess, according to the direction of the Court. Entred Trin. 1659. Rot. 959. Adjornatur.

In the Exchequer Chamber.

(89) Entry. ON Swain *against* Rogers, 1 Cr. 32. & Heatons Case 42 Eliz. cited by Hale, the Barons and Judges being there, it was said, That the Entry of a Capias or Misericordia after a general Pardon is not usually done in the Com. Ba. with a pardonatur in the Margent, but otherwise it is in Ba. Reg. but the one or the other may be done on good Reason, because he that is pardoned may be within the Exceptions of the Act, and must aver aliquando, that he is not the same person excepted. Post.

(90) IT was also doubted by the Judges in the Exchequer Chamber, whether the Entry of Judgment in English be good, it is considered that the Plaintiff shall recover the Pleadings then being in English: And it was said, that in B. R. several Judgments had for this Error been reversed, but by them this is intended of the Judgments of Inferiour Courts, and not of

of the Judgments of C. B. Yet Jeaquell an Attorney affirmed, that it was so done of them also, because it doth only imply time future, whereas the Judgment is always. Therefore it is considered that the Plaintiff do recover in the present, but by them this is a Fault amendable.

July 1. Bush *against* Chamberlain.

A Sheriff who cannot do Execution by a posse comitatus, ought to acquaint the Deputy-Lieutenants of the County, and if they assist not, he must acquaint the King and Council; but yet the Sheriff shall be amerced if he return that he cannot do Execution. Post. (91) Execution.

Winter *against* . . . .

CArne moved to quash a Writ of Error directed to Sir Orlando Bridgman & Sociis which is certified by Foster and Hide, and per Curiam, it was quasht. (92) Error.

Ante.

UPon an Account only common Bayl is used, but upon a Habeas Corpus special Bayl shall be to render the Body on Scire facias against him, and a Capias against the Principal, the Condition of the Recognizance is to render his Body or pay the Condemnation, and without making his Account there is no Condemnation: But by Wild, The Presidents are only that such Bayl that render not the Body shall be fined, because they do as it were engage Body for Body. Per Curiam, The first Bayl is only to appear to Account, and then on Judgment quod computit Capias shall issue, and a Scire Facias against his second Bayl for the Sum for which he is adjudged to account, which unless he can discharge, shall lye upon him; and therefore the Scire facias must be, that he render the Body, or pay the whole Sum. (93) Bail.

ONe may have Restitution upon a Forcible Entry, notwithstanding that a Lease of Ejectment be determined. (94) Restitution.

The King and Rosse *against* Stiles.

THe Court refuse to grant Restitution to him that was ousted by Award of the Justices after Certiorari awarded and before the delivery of it, but awarded a Writ of Re- (95) Golds. 96. pl. 12.

stitution not to be executed till the Title tryed in an Ejectment, or default made by the Parties.

Error Fitzh. 40.

(96) Brief d'enquiry. IN Repl' Jones moved for staying the filing of a Writ of Enquiry, because there is no Judgment entred upon the Roll: but by Allen, this is not usual, but only that it be signed, which the Court agreed. Also the Damages and Costs are 20 pound, which, the Tryal being in Durham, was held reasonable. And Twisden cited the Case of Amersely, where in Repl' the Jury found 300 l. Damages, and upon a new Tryal upon supposition that that was excessive, another Jury gave 500 l. and another after that 300 l. and all without remedy by the whole Court, because only the Costs are by them afferable.

(97) Bail. IN Trespass for mean Profits special Bail is always given by Stroud, and so upon the Bond sued against the Surety for non-appearance of the Principal, but til it appear that the first Action requireth Special Bail, Common Bail is sufficient.

. . . . . *against* Noell.

(98) Covenant. IN Covenant that H. will carry so many Men to Jamaica as the Defendant should bring, not exceeding 180. in consideration whereof the Defendant promised 5 l. a Head, the Plaintiff said he carried 160. and the Defendant brought no more: the Defendant saith he brought 180, and none was ready for the Plaintiff to receive them into the Ship: Judgment for the Plaintiff. Nisi.

Cooper *against* Gardner.

(99) Prohibition. WIlliams shewed cause against a Prohibition to the Sessions of Mongomery, because, as Bagnal *against* Owen 3 Car 1. the Court there had Jurisdiction mixt, and have proceeded to a Decree, whereas it might have been demurred when the Cause was first brought by Bill, being for a Trespass. But by Powis for the Prohibition, If it appears that there is no manner of Equity in the Bill, the Court, notwithstanding a Decree, may award Prohibition. Twisden, hereby, upon 34 H. 8. the Jurisdiction of Southwales will come in question, and therefore they would not be content only with the Sug-

Suggestion, but would see the Bill it self, for he held that a Prohibition is not honourary, but ought to issue when requisite; whereupon the Prohibition was waved until a view had of the Bill.

The King *against* Gakes.

WEst moved to quash an Indictment of Forcible Entry, (110) Indictment.
1. Because that it is said Juratores, &c. super sacramentum dicunt, &c. and say not quod Juratores onerati & Jurati, &c. 2. There wants vi & armis in the expulerunt; whereupon it was quasht, though as to the first Exception it be good enough, jurati & onerati being intended at Tryals at Nisi prius, not in Indictments; and on Affidavit of Spoile made, a Restitution was awarded, Nisi, &c.

IF the Plaintiff will not file his Venire, the Defendant may (101) Tryal.
take out a new one and trye the Cause by Proviso, as was agreed per Curiam, Dy. 215. pl. 51. 14 Ed. 3. 16. §. 1. N. 2. 11. & 2 Ed. 3. 16. §. 1. N. 3.

TWisden challenged all the Bar to shew one President of (102) Restitution.
Restitution granted to a Spiritual or Lay Hospital, or any other place that had particular Visitors, before 20 years last past, but yet they will have returns made upon their Mandamus: and he cited a case of the Bishop of Durham, that was fined 2000 l. for not returning a Mandamus here, in the time of Ed. 3.

Widerborn *against* Kendall.

AN Amendment of a Record after removement out of the (103) Amendment.
C. B. was allowed on Rule made in the C. B. and the Record of the C. B. was brought in by the Clerk of the Treasury for that purpose in B. R.

A Prohibition shall not go to the Prerogative on the calling (104) Prohibition.
of Executors or Administrators to Account, but quoad distributionem it was awarded, per Curiam.

July

July 2.

(105) Dy. 202. b. pl. 71. ERror was assigned by Monday, because that the Heir on Voucher pleaded riens per discent the day of the Voucher, and between the Vouchee and the Tenant an Interpleader was had, which is a Delay, and therefore the Demandant shall have Judgment presently in Dower, and therefore it is no Error. 2. Judgment may be against the Ter-tenant, that he shall be in misericordia, notwithstanding that the Vouche be within age. Judgment for the Demandant.

(106) Certiorari. A Certiorari to remove a Record is returnable immediatè regularly, though the party for whose Benefit it is may have it at a day certain: And on Diminution alledged after (nothing being done upon the Certiorari) a Scire facias issued, which because it had not 15. days, Bear Serjeant moved to have the Judgment reversed for Error; but because no Oir thereof is demanded, but the Defendant pleaded gratis in nullo est erratum, therefore the advantage of the defect of the Scire facias is waved. Bear for the Plaintiff, in the Error urged, That albeit that the Scire facias is taken out by him, yet it is entered by the Defendants Attorney; yet because that the Teste of the Scire facias doth not appear of Record, the Court awarded the Proceedings to be good: but because the Certiorari was of Record coram Olivero St. John & Sociis suis, and the Record that is certified is by R. Foster, &c. the Writ was abated: yet by Twisden, this is no advantage to the Plaintiff in Error, because the second Writ of Error is no Supersedeas.

In Error Br. 117. Ante.

(107) Jours. KEeling conceived Shelleys Case, being of Land was more strong than this, that the Term is but one day, and this Judgment was for a just Debt and to prevent the Spoil made by the Wife, as it appears by Affidavit. Twisden Justice conceived, That in many cases the Law will not allow Fractions, but, as 4 H. 6. in many it will; as if the Plaintiff purchase a new Assize the same day that he had Judgment, that another Writ is depending is no plea. Also if an Executor pay a Debt in the morning, he shall not be allowed to plead riens entre manus Jour of the Writ purchased the same day. Keeling said it was agreed on the Indictment of the Murderers of the late King, which was contra pacem of the same King, That by

by all the Judges of England this was good. But by Twisden, A Recovery is but one Act, otherwise of such a Judgement as this is on Warrant of Attorney, and yet this shall be avoided if it be by Covin, but it is not perfect until signed by the Clerk, but is countermanded by his death that made the Warrant before Judgment. By Allen, And the Consequence hereof is to allow this Judgment given on Warrant by a dying person who could not write his Name, which would be an Occasion of great Trouble; and such a Judgment in the City of London acknowledged by fraud would be vacated. But by Twisden, This is but evidence to a Jury, and not to avoid the Judgment here. Also by Windham, By the acknowledgment of the Judgment, which was in his Life, the Warrant of Attorney is determined, and the other proceeding is the Act of the Court, which on an Act well begun, will not make fraction of a day, which the Court agreed. And by Foster, To question this Judgment upon this nicity, would introduce greater inconvenience, for it may be avoided by Error or by pleading of Collusion, and therefore shall not be vacat by Motion, but shall stand; for on a non sum informatus Rules are not necessary by the Clerk, according to the course of the Court.

Robinson *against* Amp.

Sider. 48. pl. 7. In Deceit Br. 2.

(108) Deceit.

MAynard moved in Arrest of Judgment in an Action of Covenant for suing on a Statute contrary to the Defeazance, which by him is no breach of Covenant, but he ought to have brought an Action of Deceit; for in Covenant he ought to alledge a particular Breach, 43 Ed. 3. 20. and conclude contra formam conventionis, which he hath not done here. Allen, The Covenant is broken because it was to deliver up the Statute to be cancelled, and cause the same to be vacated: when, as Means Case, the Money should be paid, and here by suing out Execution upon the Statute, he hath quite disabled himself to deliver it up, but it might have been otherwise, if the Covenant had been only, it should be void on payment of the Money, there an Audita Querela or Action of Deceit might have been the proper Remedy: but this is more of an Act to be done on the Defendants part, and the Breach is generally assigned in suing out Execution, which relates to all the points of the Covenant. Maynard, The Covenant is not that he will not do any mean Acts, for he may sue Execution and yet cause the Statute to be cancelled: But per Curiam, This is only

Godsb. 146. pl. 65. Had such a Covenant been made pending Suit before Judgment, it could not be pleaded as defeazance. 3 Cr. 837. pl. 11. 3 Cr. 7. pl. 3. 3 Cr. 128. pl. 3. Moor 709. pl. 989.

only a performance of words, not in reality, because hereby the party that is to pay his Money is without benefit. Also Covenant will not lye upon a bare Defeasance without this further Covenant to deliver up: And by Foster & Twisden, The particular Breach must be assigned, but because that they doubted whether this be a Breach of the Covenant or Deceit. Adjornatur.

2 Cr. 505.
3 Cr. 77. pl. 32.

Hatton *against* Jackson.

(109) Scire facias. Leonard 64. pl. 84.

IN a Scire Facias on Judgment in Debt on Bond, as in Eodes Case, the course of B. R. is never to recite the Term of the Judgment given, but it is otherwise in C. B.

(110) Tryals.

A Tryall at Bar at the latter end of a Term may be granted, notwithstanding the Defendant hath not pleaded, because else the Plaintiff having time to make up his Book till the end of the Term, the Defendant thereby would else be defeated of it.

(111) Amendment.

IN Debt on a Bond for performance of Covenants, the Defendant cannot now pray Oyer as heretofore, but must plead to the Indenture and produce it to the Court. 2. The Plaintiff declared on a Deed dated the 30. Jan. the Defendant demanded Oyer, and the date thereupon was by Indenture of another Date; and now the Plaintiff prays that this Mis-entry might be amended, being only upon Oyer, which is the Act of the Court, and therefore may be, but not so if it had been on a Deed so pleaded; and because that this is but only a false recital by the Court, it shall be amended though in another Term, per Cur.

(112) Ireland.

Nota. The Ch. Justice here may command the Ch. Justice of Ireland to do Execution of Lands there against Manucaptors or other persons, per Curiam, and by the Clerks, if the Roll here be not marked till the return of the Writ, the common Bail shall stand but only to save Amerciament, but not so but that upon good cause the Court may award special Bail. Also if the Plaintiff sheweth cause at the return of the Writ, he may have special Bail, though the Roll be not marked, but then the Defendant must have notice of it by the course of the Court. Also sufficient Bail of Irish Men whose estates are there, was allowed good.

The

The King *against* Tench.

IT was said, that the forging of an Alias is discharged by the Act of 12 Car. 2. of Oblivion, because it is not any Offence that is within the Exception; for though every Record be a Writing, yet every Writing is not a Record, by Newdigate Serjeant for the Defendant. Windham Justice, Exception of the Lesse is exception of the greater, though Pardon of the less doth not extend to the greater: and by the Act all Escripts Writings, &c. all are excepted, being forged; a fortiori a Record, which the Court agreed. (113) Pardon.

A Misnomer was pleaded in Abatement: Bear pro Beer on 5 Ed. 4. 57. Misnomer Br. 58. and ruled per Curiam to be frivolous, and a Respondeas ouster agard. (114) Misnomer. 3 Cr. 85. pl. 3.

July 3.

NOta. By Twisden, By the Course of the Court, if the Attorney of the Plaintiff swear positive Notice of a Tryal, though the Defendants Attorney swear he had none, or excuseth it, that is not sufficient, but the Affirmative shall stand. But by Windham, The Attorney is not Judge of sufficient Notice, and therefore if by the Circumstances it appeareth to the Court, they will Judge whether it was Notice sufficient or not. (115) Notice.

Glascock *against* Morgan.

IN Debt upon a Bond to pay Money on Marriage, or at the age of one and twenty years of his Daughter, on 29 Ed. 3. 8. 2 Co. 102. the Jury may try Wife or not Wife, but not the legality of Marriages: And this was moved in Arrest of Judgment on Issue unques accouple, or Debt on Bond to pay Money on Marriage or one and twenty years of Age after Verdict. 2. Wild took another Exception, That it is not alledged that the party was married at the time of the Bill, but Issue being joyned upon Married or not Married, after Verdict this shall be intended, there being a good Affirmative and Negative, per Curiam. And by the Act of 12 Car. that confirms Judicial Proceedings, the Legality of the Marriages shall be tryed by Jury; yet here the Issue is not (as in Dower) where legit. modo Maritatus which shall not be tryed by Jury; but (116) Marriage.

in Debt on Bond its no more, but unques accouple, which doth not draw the Right of Matrimony in question, per Curiam. Judgment pro querente.

Lattam *against* . . . . .

(117) Costs. THe Lessor of the Plaintiff is lyable to pay Costs (though he shall never be forced to give Security for them) but the Lessor of a Tenant in possession is not lyable to Costs, because though he may come in gratis and defend his Title, yet the Tenant in possession is only lyable to Costs by the Law but only by the course of the court, unless the tryal be by the Lessors means brought to the Bar, and then he shall never have a second Tryal at Bar before he hath paid the Costs of the former Tryal; but yet the Court for non-payment of Costs will not hinder proceedings in the Country, per Curiam.

1 Cr. 116.

(118) Entry. THe Plaintiff shall be compelled by the Court under a pain to bring in his Postea, but this before the Judgment entred cannot be pleaded in Bar of any new Action.

(119) Misnomer. ON Motion of Bear to set aside plea in Abatement, by Misnomer Straight for Streight, the Court awarded the Plaintiff to plead or take Issue, though per Curiam, the Plaintiff may plead that the Defendant is known by the one Name, and the other; and therefore though it were a frivolous Plea, the Court would have the Writ mended, which being an Original, cannot be, but the Defendant agreed that the Plaintiff should purchase a new Writ.

Stock *against* Westphaling

(120) Error. ERror of a Judgment in Ejectment was assigned in the day of Nisi prius, which is 20. in the Postea, and the 30. of April in the Roll. 2. The Transcript of Trespass and Ejectment was in placito transgressionis & ejectionis, without firmæ, which was awarded to be amended here, being of the Transcript, but it should be amended in C. B. if it were in the Record it self before Removal.

Nota

Nota. The Husband that claims nothing but a Trust, shall not have the benefit of Priviledge, as Twisden Justice said, had been adjudged in this Parliament in the Case of the Lord Moon, and this the Court agreed. (121) Priviledge.

Nota. That a Man cannot now give the special Matter in Evidence on general Issue, nor can he mend Plea of another Term, or of the same Term, as of another, without the consent of the Parties. (122) General Issue.

Nota. That on Rule given to transcribe a Record, if in two Terms it be not done, the Defendant in the Writ of Error may nonsuit the Plaintiff without Motion. (123) Nonsuit. Error Br. 6. M. Dy. 245. pl. 64.

Nota. Pro Regula by all the Court, That a Prohibition shall never be awarded the last day of a Term, no more than Restitution: but they confirmed a Rule, and made it absolute on Oyer of the Suggestion the last day of the Term, which was de diversis contractibus, and doth not say, infra Jurisdictionem of the Court of Cinque Ports, Emergent. (124) Prohibition.

Notice at the House is not sufficient in Ejectment, because this may be, as Twisden cited a Case, thrust into the Rafters, but at the House with a Servant, is good: yet Affidavit thereof being amended, the Judges may give a Rule thereon for Judgment against the Casual Ejector in their Chambers after the Term; and the acknowledgment of the Defendant that he received it, is not sufficient. (125) Notice.

A Man may be indicted of a Forcible Entry although he hold peaceably; and therefore to say that he extra tenet with force, is not necessary, per Curiam, and the last Rule on taking that Exception, was quasht. (126) Indictment.

Nota. The Tenor of the Record is sufficient to be certified by Inferior Court to the Superior Court, as in Limry *against* Langhams Case was held, because the Certiorari is only to know whether there is any such Judgment. (127) Certiorari.

Nota. That on a Declaration delivered before the Essoyn Day, the Defendant pleads as of the last Term, but not so on delivery after the Term begun without Agreement of the Parties, per Curiam. (128) Pleading.

Ante.

(129) Error. IT was urged on 1 Cr. 296. & 20 H. 7. 9. That the Tenant shall take advantage of Error against the Vouchee in an Action of Dower, as that a Misericordia was entred against an Infant Vouchee, 5 Co. by Serjeant Bernard for the Defendant: but per Curiam, this shall be against Vouchee only, and not against the Demandant, who is to have Judgment only against the Tenant, and therefore the Vouchee shall not have advantage of any Error between the Demandant and the Tenant; and this Judgment against the Vouchee is for the Benefit of the Tenant, and therefore by Foster Ch. Just. he shall not have Error thereon. Also the first Judgment is absolute, and only cessat executio until the Voucher be tried; but otherwise it should be if the first Judgment were against the Vouchée, and that the Tenant recover in value that is all but one Judgment: and per Curiam, he had Execution.

3 Cr. 46. pl. 1.

Opie *against* Wilton. Ante.

(130) Entry. Leonard. 176. pl. 240. 3 Cr. 153. pl 33. IN Trespass upon the Case in C. B. Judgment shall be in misericordia only without any pardonatur in the Margent, notwithstanding a general Pardon: and this was certified by the Prothonotaries to be the course of the C. B.

Howards Case. Ante.

(131) Ch. de Pardon. Br. 10, M. HE now brought in a New Pardon which recited the Indictment and Verdict, but in it was no suggestion, whereupon the Pardon was grounded: Also it wanted the words Murder; but because that the Writ of Allowance was dated the 3. day of July, of a Pardon of the same Date where re verâ the Pardon it self was dated 23. July, which is not yet come, which the Court would neither amend, nor yet allow the said Pardon; whereupon he went into the Chancery, and there had another in the same Form, and then that was after allowed.

So of Protections, 44 Ed. 3. 2 pl. 6.

DE

DE

TERMINO Sancti Michaelis.

1661. An. 13 *Car.* II. in *Banco Regis.*

Foſter *Chief Juſtice.*

Wedneſday Octob. 23. { Mallet, Twiſden, Windham.

THe Court agreed, 6 H. 7 15. That a Writ of Error with an over long Return, is no Superſedeas; nor can ſuch Writ, being under Seal, be mended here; but in Chancery by Motion it may. (1) Superſedeas.

Opie *againſt* King.

IN Action on a Charterparty made in B. and the parties living there, Stroud upon Affidavit moved to change the Venue, being in another Term & præter Regulam, which the Court refuſed to grant, being a Suit upon a Specialty, as upon a Bond, &c. and the Party muſt prove his Counterpart in L. where the Action is laid. (2) Liew.

Johnſon *againſt* Waring. Ante.

STroud Jun. moved in Arreſt of Judgment in Action upon Eſcape upon a meſne Proceſs by Exception to the Record, which the Court would not hear till brought into Court; nor if it had been to the Verdict, would they have heard it till the Poſtea (3) Record.

stea returned, which is in the Will of the Plaintiff any time in the Term; and the Defendant hath four days after its coming in to move, &c. but cannot do it before, though he give notice to the other party. 110 pl. 6.

The King *against* Osborn.

(4) Restitution. WInnington shewed Cause against awarding a Restitution, because it depended upon a doubt whether H. may devise Gavelkind Land: and Mich. 59. a Verdict was against the Custom, that H. may devise; and the first Offence, viz. a Forcible Entry is pardoned, and so the party would be remediless; and this is in the discretion of the Court, and seven Verdicts and a Nonsuit hath been for the Custom, by Finch Solicitor: But by Twisden, Multitudes of Verdicts is no ground because they have been contrary, and Restitution was awarded upon quashing the Indictment, and so the Offence being pardoned, the party cannot be re-indicted. Wild Kings Serjeant shewed that the Lease of Ejectment made by Osborn is expired, and so no Fruit can be had of the Verdict before without a Restitution. Windham, The Jury found 1 Cr. against the Opinion of all the Judges, and therefore unless the Prosecutor hastned another Tryal in another Action according to Agreement, this Term Restitution was awarded.

King *against* the City of York.

(5) Dilatories. IN a Quo Warranto by Keeling Serjeant, who moved for time to plead: Ipswich and Yarmouth had a Year to plead, but he desired after a long Vacation to have till Hill. Term for the City of York: but the Court would give but a Fortnight in the Term, which may be said initium Termini, according to the Rule, being only for the private Corporation.

Johnson *against* Waring. Ante. 109 pl. 3.

(6) Monstr. Br. THe Exceptions which Stroud took were, 1. That it is said L. entered into Bond, but doth not shew where, which being after Verdict, and depending on it, the Court would not willingly hear it, till the Postea come in: yet upon reading the Record, it appeared to be only Inducement to the Action upon the Case for the Escape, which recited all the former Proceis and Judgment on the Bond. 2. It is said, he did escape but saith not when; yet it is shewed when he was in Prison which is within the time of Limitation, and though committed

ted by Rich. Protect. yet if he had no power, then the Party may plead Not Guilty: Adjornatur, till the Postea returned, which the Attorney for the Plaintiff said, was stayd by Order at the Assizes, which yet the Court ordered to be moved by the Plaintiffs Council to stave it in Court, that all may appear.

. . . . . *against* Sir Rich. Bellison.

(7) Pleading.

UPon a Bond for performance of Covenants generally, H. may plead general performance; but when to do any particular Act he must answer certainly. 2. Defeasance unless made the same day of a Stat. and delivered uno flatu, cannot be pleaded in Bar, as the whole Court conceived, upon opening of a Record in Demurrer. Adjornatur.

Siderf. 59. pl. 27. Fines *against* King.

(8) Arbitrement.

IN Debt to perform an Award, which was, that one should pay the other Release, &c. Proviso, That if any of the parties were within the Act of Indemnity and Pardon, that for so much the party should be excused. Finch Solicitor upon Demurrer conceived the Award which was set forth in the Replication good, and the Proviso not material in the Rejoynder after no Award made pleaded in Bar. Adjornatur.

Errington *against* Chat.

(9) Respond. Ouster.

H. Pleaded in Abatement that there was no such Parish in the said County as supposed; the Plaintiff offers an Issue the Defendant demurs, which prima facie the Court over-ruled, and Respond' Oustre, but by the Attorney of the Defendant in Com. præd. was not in at the time of the Plea, which the Court regarded not.

Dockson *against* Ellis.

(10) Pleading Br.

IN Debt upon Bond for performance of Covenants in Indenture, to which the Defendant pleaded performance; the Plaintiff replyed, that one was, that the Defendant should not do any Act to hinder the Plaintiff of Water, and sheweth the Defendant cut up the Cock, and so hindred, to which the Defendant demurs. Adjornatur.

Nota.

(11) Nota, By the Course of the Court after Issue joyned, Notice must be 14 days at least, exclusive of the day of the Date, and of the Assize when the party liveth far off.

Day *against* Guilford.

Siderf. 54. pl. 22.

(12) IN Ejectment its found by especial Verdict, That the Father Let for life, and acknowledged a Statute to the Lessor of the Plaintiff, and a Scire facias against the Heir in Reversion, who by Scire feci is returned Heir and Ter-tenant; wherein he might have pleaded, (Kilborn *against* Wracks, Mich. 1657. B. R. F. N. B. 104. Kel. 125.) and an Action upon the Case lieth against the Sheriff upon non Summons; but shall have no other remedy till the last Judgment be discharged. Townson *against* Barecocke 1652. Hill. B. R. upon two Writs against the Bail he brought Audita Querela; but no Writ of Error for death of the Principal, suggesting no Capias went against the Principal, which he might have because no Notice is supposed. Quære, if a Scire facias here had been returned; (Wind.) Doubt whether he be not relievable, because this Land was never asserted, as in case of Tenant in tail, or the other Cases it was 6 R. 2. Assize 69. Twisden vigilantibus non dormientibus, &c. and if he come not in and plead upon the Scire facias, though he be a mere Stranger and in of another Estate, as the Issue in tail is to a Judgment against the Tenant, he shall never avoid it, but is estopt and shall never falsifie, Hanner *against* Mare, Hub. 283. to which the Court agreed. Adjornatur.

Stiles 323. pl. 695.

6 Keble 337. pl. 61.

Dolbin *against* White.

(13) HE is a base Fellow, and I will question him ere long, for that he would have taken away the Kings life. Twisden, That H. would have killed the King is actionable, per Curiam; and so they conceived the words well actionable, as well as if he had said, I do question I. S. of Treason.

Slander.

Austen

Auſten *againſt* Mandre. Rot.

(14) ERror of a Judgment in B. That the Venire facias was to return 12, &c. and in the Alias its not ſaid to Recognize at large, (but only and ſo forth,) which in Inferiour Courts ought ſo to be; But per Twiſden, if the Trial appear to be within the Jurisdiction it is ſufficient, as Osborn *againſt* Gregory, which the Court agree. 2. They do not ſay that the Proceſs was awarded in, by or at the Court, but only as aforeſaid, ſed non allocatur. 3. The Judgment was of Coſts ex incremento, and do not ſay (Circa ſectam ſua expenſa) which is neceſſary according to the uſual Preſidents of this Court and the Com. Ban. as well upon Verdicts as Demurrers. In Inferiour Courts they draw their Judgments by ſhort Notes, and the Attorneys here enter them at large, and ſo they ſhall not be aided by intendment. The Court agree, if it had not been ad Requiſitionem of the party it had been Error; but the principal Judgment for Damages and Coſts were, which he had expended in the Suit; but ex incremento were found by Verdict only guilty pro miſis & Cuſtag' without Circa ſectam, of which there were two Preſidents ſhewn by Hern Secondary. Adjornatur.

Error. Stiles 164. pl. 378.

Palmer *againſt* Stratwick.

In Avowry Br. 37. (Sen. 38.) m'.

(15) REpl' upon demurrer the Queſtion was, when H. avows for a latter, whether after he may avow for a former Rent. Jones for the Plaintiff conceived, that he could not no more than on Acquittance, eſpecially having relied upon this Eſtoppel; (for H. may avow for ſeveral days Arrears ſeverally, 2 Ed. 2. 32. pl. 10. Avowry F. 172. If H. have Return irrepleviſable award for latter, he cannot after avow for former Services, 25 Ed. 3. 47. b. ſeu 11. b. pl. 38. per Grene.) Barre F. 79. is againſt both Caſes; but 11 H. 4. 55. and Penants Caſe 3 Co. 65. are otherwiſe. But 2. the Avowry was made here betwixt the ſame perſons, but the Repl' was by others, but the cauſe of Action is the ſame in both; yet he admitted in caſe of change of a Baily one ſhall not be bound by the act of the other. Allen for the Defendant, Confeſs the Caſe of Dy. 271. of an Acquittance Bendloes Rep. which is a diſcharge for all before. But Avowries may be made at ſeveral times for ſeveral Rents, and the Matter in truth is againſt the Plaintiff,

Barr. Aſſize F. 63. Moor 7. pl. 26. 47 Ed. 3. 7. pl. 3. per Pliſay. Rec. in Aſſize of the latter is no bar of former Rent, 9 Ed. 3. 8. b. pl. 21. but in a Ceſſavit tender of the latter accept is diſcharge of former Arrears, 17 Ed. 3. 57. pl. 40. per Shard Diſtreſs Br. 14.

because the Avowry of the Baily cannot make the Master lose his Arrears, and what he doth is only in his right and as Servant to him, F.N.B. 71.L. and Recaption lieth not for the Lords Distress after the Baily hath made a former. Windh. conceive clearly they were several duties, and avowry for one is no Estoppel; and not like an Acquittance which is a Release, especially this being betwixt other persons. But by Twisden, when H. doth no more than he must, as giving Acquittance for an Annuity he shall not lose the Arrears: So here when the Baily distrains he must avow, and therefore had it been betwixt the same parties it had been no Estople; which cannot be of the Master by an act of the Baily; (Contrà per Mallet;) but Foster agrée that its no discharge.

Avowry for Rent on a Disseisor in Court of Record is a Bar of Escheat. L.Co.268. Contrà of Accept.

Judgment nisi.

The same Judgment was betwixt Edwards *against* . . .

Syderf. 57 pl.24. Lawson *against* Crofts.

(16) Administrators.

IN Action against an Administrator he saith, he was durante min. ætate, and that H. came Chaunlers Hub. of age, and doth not say how he had discharged himself. Which after Imparlance was pleaded in Bar, and a Demurrer thereupon. Foster conceive, that when the Minor comes of age he shall be specially charged, as shall also the Administrator. Twisden, After Age he is in as of his own wrong, and by him shall so be charged. Though Jones Judge conceived he should be charged specially, and by him this plea in abatement concluded in Bar is naught (though it was said he did not administer after the Infant came of age. They conceived, he ought also to shew he had fully administred until then.

Monstr' Br. Goldsb.136. pl.38.

Siderf.45 pl. 3. Tricket *against* Hanby.

(17) Assumpsit.

SCrogs in Arrest of Judgment in an Action upon the Case upon a Promise, that consideration of forbearance in Yardly's Case generally is not sufficient, which the Court denied. But if it be for paululum tempus, 1 Cr.241. which is naught, for all any averment that Forbearance was till the Writ was brought; but for a reasonable time it is good with such an averment, for the Court upon the Evidence shall direct the Jury whether it be reasonable or not, but not after Verdict here, as the Court agréed. 2. The consideration was of forbearance until he and they could go to B. and examine Witnesses, &c. and the averment of Forbearanre was till they could go, &c. But the Plea Roll was They, yet the Court conceived

ceived it naught, for one might send when another could not, and therefore they should not be severed, or comprehended in the general word They. Judgment Arrest. Post.

Grager *against* Hemborough.

H. 12 Car. 2. Rot. 889.

(18) Upon Covenants performed plead generally, and special breach for non-payment of Rent assigned in Repl' in Debt upon Bond, a Rejoynder that the Plaintiff entered before the Rent-day is not good, but a departure; because Dy. 290. it might have been pleaded in Bar, (as 44 Ed. 3. 42 pl. 45.) as a Feoffment to use is a departure from a Feoffment generally alleadged before, so 5 H. 7. 25. Baldwin for the Plaintiff who demurred. Jones for the Defendant, that the Rejoynder doth corroborate the Bar, which could not be otherwise pleaded to pursue the words of the Bond, which is for general performance of Covenants, as in such case he might have alleadged in the Rejoynder, there was no demand, Baker *against* Spain, Hub. But in Action of Covenant he agreed it had not been good. Windham conceive it a departure, and not like the Demand, which is necessary to make the Rent due, whereas this is only an excuse of what he confesseth, Chapman *against* Chapman 1 Cr. 76. Twisden agree, and that he should have said he performed till such a day. Foster doubt. Adjornatur.

Entr' congeable Br. 2. 2 Leonard 91. pl. 114. 3 Cr. 244. pl. 2. 3 Cr. 255. pl. 28

Harris.

(19) Thou art a Traytor and a Rebel, spoken 8 Jun. 1660. The Defendant justifieth, that at such a time he was in fight under the command of Seely 28 Sept. 59. against the King. The Offenders were pardoned before the words spoken, Cudding *against* Wilkinson, Hub. And therefore the Plaintiff demurreth, and doth not say as Charter of Pardon Br. 21. that he is not within the Exceptions of the Act, which the Court conceived naught. Adjornatur.

Ch' de Pardon.

Nicholson *against* Sherman.

(20) Action upon the Case. In devise Br. 6. Br. Cent. 3 Aff. 63. p. 346.

ACtion upon the Case for a Legacy devised to H. when he should set up his Trade, if the Executors had sufficient, and its averred that the Executors had sufficient, and that the Plaintiff came to age and Set up. 1. The Will was, that the Executor should double his Legacies if the Estate sufficed, which was waived as a sufficient devise of a Legacy, and not at their discretion. 2. That an Action upon the Case lieth. Jones for the Plaintiff, Glan. cap. 6, 7. conceived it did, for the Breach of Trust by the Executors. Consideration of Forbearance is good for Assumpsit against Executors, Assent upon Conditionnot good, and in an Action brought by the rightful against a wrongful Executor for them lieth, so far the Common Law doth take notice of them; and when men are indebted to another for, 2 Cr. 544. the Injury, an Action lieth as well as by way of Assumpsit. So when any duty is due from one man to another an Action lieth; and to say that Legacies have not been sued for in specie, may be true as an Indebitatus Assumpsit, till Slades Case; but the novelty is not material, being only want of good pleading, for here it is but sued for as a duty of Breach of Trust. Wild for the Defendant, That an Action upon the Case lieth not, being a Testamentary thing, of the original whereof they have Jurisdiction, Regist. 38. in the Court Christian, and its the office of this Court, not ampliare but regulare Jurisdictionem; and as to the Indebitatus Assumpsit the Common Law had Jurisdiction of the original Debt, and that was only a new Action; and the reason why they were countenanced in the late times was for want of Justice, the Bishops being not then in fact though de Jure, and the breach of Trust is a personal wrong and dieth with the person, as Dy. 322. or Trover lieth not against the Executor for Tort done by the Testator. Windham conceived, that as the Bishops are restored to their Lands, they should be also to their Jurisdiction; and this is a gift after the death of the Intestate, and though the Exchequer would send a Prerogative Writ, yet never any other Court did so for a Legacy, for its not payable at Common Law, nor can an Action upon the Case be grounded upon any default without some special Injury, as for default of Rent or Annuity, &c. for so men may draw the Questions of all Laws, what ever to the Common Law; and as the Suit cannot be for the Legacy, so not for the non-payment of it. Twisden said, Legacies out of Land are properly suable in Chancery, and yet in ancient times, as

in

in title Debt and Legacy in the Book of Entries an Action lay at Common Law; yet here, when the Breach is in default of a thing of the Original, whereof another Court hath Jurisdiction, an Action upon the Case lieth not, lest thereby men bring in question all matters whatever; but especially here if it would lye, it would not lye against an Executor of an Executor, to which the others agreed, and Foster wondred to hear such an Action brought, having never been heard of this 60 years, which he hath been related to Westminster. This was upon demurrer to the Declaration, but the usual pleas hereto were Not guilty, or Non detinet. Baldwin and Stroud relate the Exchequer Chamber, to have given an Opinion in the same point, that an Action would not lye in a Case they argued.

Judgment pro Def. nisi.
Rot. 1540.

(21) Slander.

I. S. was at the stealing of divers Cows; not Actionable per Curiam.

Bush *against* Chamberlain. Ante.

October 25.

(22) Process. 2 Cr. 515. pl. 28. That the Sheriff cannot make return of Resistance, because as Westm. 2. cap. 39. its in *Dedecus Regis*, and therefore the Sheriff ought to go in person with Power; as Goldsb. 79. pl. 14.

UPon a Resistance of Execution the Council Table refused to meddle, because this Court ought to see their own Judgments executed; and Finch prayed a Writ to the High-Sheriff (which all Writs are,) but with a special Rule that the High-Sheriff should execute it himself; which the Court granted, and a Tipstaff to fetch the Under-Sheriff up to return his Writ, which is better than an Attachment, which is returnable by it self.

Eden *against* Chalkill.

(23) Evidence.

IN Ejectment it was observed in Evidence to a Jury, 1. That a Will under which Title (Pur le Plaintiff) is made, must be shewed to the Court it self, and not only a Copy, which they refuse to admit, 1. If it had been only a Circumstance, and as inducement, and the Will remain in Chancery or other Court, by special Order of such Court. 2. An Enrollment of a Fine or other Conveyance not being a Bargain and Sale, though acknowledged by the Parties themselves, was not regarded without proof of the Deed, because it was needless. 3. When Trustee to the use of I. S. for life, the Remainder to his first Son, joyns with Tenant for life in a Fine, Cestuy in Remainder is scarcely relievable in Equity.

4. Con-

4. Consideration must be considerable, though not to the full value of the Land.

Robinson *against* Amp. In Disceit Br. 2. 276. Ante.

(24) Covenant. IN Action of Covenant in nature of a Defeasance of a Recognizance, that upon payment the Recognizance should be delivered up to be vacated, and caused to be cancelled by the Defendant. Allen moved for Judgment, and that the Action of Covenant well lieth, because it doth not terminate in it self, as Com. 38. but is for a collateral Act, and engageth the party to further Acts, as to be delivered up and to be cancelled, and not only that it should be void. 2. The Defendant pleaded generally performance; and the Plaintiff said, that the Defendant means before delivery he had sued an Extent, which 5 Co. 23. is a present Breach, though no Mony by the Plaintiff be paid, because he is hereby disabled to deliver it up when the Defendant shall pay his Mony. Jones for the Defendant, The Covenant is to deliver up the Recognizance upon payment, &c. and acknowledge satisfaction; and the denial of either of these should have been pleaded by the Plaintiff, and so he might have had an Action upon the Case for this fraudulent taking Execution, but no Covenant. Windham upon Covenant to do a thing, when done no Covenant lieth as to stand seized, &c. Contrà When Executory, as case is, as 5. H. 7. to enfeoff I. S. of D. taking a Wife or granting a Rent is a present disability. This is an Act precedent to the Act that is to be done by the Covenant, and puts the Statute in another plight, which he conceived a sufficient Breach. Twisden, This lieth not properly in Covenant of it self, being a bare Defeasance, (and as the words are not only barely to deliver up, which may be, and the Plaintiff hap of it again and so extend;) but being to cause the same to be cancell'd is by this Act broken presently, because transit in rem Judicatam by the extent, and so cannot after be vacated; but per Curiam such special matter should have been pleaded by the party Defendant in this Action, Conusée of the Recognizance. Judgment nisi.

(25) Error. Nota, That upon a Non-prosecution of a Writ of Error, within three Terms the Clerk of the Errors, without motion to the Court, may make out a Rule for Execution.

Whitcher,

Whitcher.

MAtthew *against* Craze. Thou art a Whoremaſter, and haſt had to do with the Wife of *I. S.* not actionable? The principal Caſe was, that the Defendant ſaid, the Plaintiff dealt out his Rent with the Wife of I. S. and uſed her as his Whore, as often as I. S. uſed her as his Wife. Bear Serjeant moved in arreſt of Judgment that the words were not actionable, which the Court agreed. (26) Slandre.

IN an Action upon the Statute of Uſury, Buggin moved in arreſt of Judgment, one Contract was to have 7 s. per Menſem for 7 l. &c. becauſe in the Declaration delivered to the Defendant it was Corrupti; but becauſe the Poſteà was Corruptè non allocatur. 2. General Pardon would not be allowed in Arreſt of Judgment, unleſs it were pleaded before. (27) Variance. Br.

Dopſon.

H. hath got his Maid with Child. Adjornatur. (28) Roll 34.

Blunket and Holmes.

Oct. 26.

WIndham delivered his Opinion againſt the Plaintiff, making the ſingle point on the conſtruction of the words of the Will, what Eſtate is given to Thomas Wedgwood, who ſuffered the Recovery. The Deviſe was to T. for life, and if he died without Iſſue of his Body then living, then to Leonard and his Heirs, which he conceived was but an Eſtate for life with Remainder in Tail, and not a Fee-ſimple, by reaſon the Writings were depoſited, that Thomas ſhould not alien; which yet he conceived would not help, nor the Contingent which is founded on the Eſtate for life, however confounded with it; becauſe the Eſtates come ſeveral ways, and ſo are not preſently, though afterwards they may be confounded. And this is the expreſs words of the Will. 2. To make a Fee there muſt be a tranſmutation of the Will, placing the latter words firſt, which were a ſtrange metamorphaſe, for all the Contingent is to the Remander, not to the Eſtate for life, according to the natural placing of the words. 3. This Conſtruction avoids more Inconveniences, and is more ſuitable to the Rules of the Comman Law, for otherwiſe an Executory (29) Deviſe Br. 1. 2 Brant. 95 b. pl. 250. 2 Leonard. 68. pl. 92.

Executory Devise (which by Pell and Browns Case cannot be cut off) would be made, whereas it is rather a Contingent Remainder, against which the Rules of Law fight with, and will by no means support it; Colshirst *against* Bajushan; though it will rather create that than an Executory Estate, which cannot be created by Feoffment, but only in favour of Devises; and therefore Executory Devise, which clogs an Estate against the Rules of Law, shall not be let in by a construction, by transposition and wresting, when the natural construction will make a Contingent suitable to the Rules of Law.

2. When Thomas having an Estate for life with such a Contingent, suffers Recovery, his Estate for life and the Contingent are confounded, and so the Remainders. Lit. Sect. 690. L. Co. 262. destroyed.

3. In the mean, time before the Contingent there is a Fee-simple in Thomas, which (Seamors Case) being created by the same Conveyance, doth not confound the Estate for life, Archers Case, being a stronger Case than this is; And if the Estate for life had been confounded by an ordinary Surrender to an Estranger that had had the Fee, the Estate for life had been utterly gone, and shall not be said in esse to maintain any Contingent: And thus Thomas by the Record is seised in Fee and may well Devise to his Wife, and the Heir of Leonard is barred.

Twisden of the same Opinion for the Defendant.

1. Supposing Thomas had been a meer Stranger and not Heir in this Case, then he had a bare Estate for life, the Remainder in Contingent, if he had said only to Thomas for life, and if he die without Issue, then to Leonard (Lony's Case 85.) this is a Contingent in Remainder, Baraston's Case. And he saying further, that being that if Thomas hath Issue then he shall have in Fee; this is a Contingent, and yet cannot depend on another Contingent, as in Chedington's Case; But this is the same Contingent operating several ways, as to A. if he pay C. and if he fail of payment to B. this had been a good Contingent.

2. Thomas not being a Stranger, but Heir, he hath the Fee-simple in the mean time, though Lit. Co. 342. it might be argued that the Fee were in Abeyance; yet Berks Case 6 Car. C.B. and Nappers Case Hutr. and Coneys Case are of another Opinion; and this is by operation of Law, and not by the construction of the Will, 1 Cr. 158. 3 or 4 Car. Braughton *against* Player in the Chancery, devise to two Sons equally

to

to be divided, share and share like, which was but an Estate for life in the youngest Son, because the eldest Son had no more by the Will, but only by operation of Law; and Archers Case is the same in terminis with this, and though the Reporter took no notice of this, it was because they looked only upon the Will; not but that they did see the operation of Law admitting, Pell and Browns Case (which hath been always controverted) to be Law, yet it reacheth not this Case, being a Devise to W. and his Heirs, and if he die without Issue then to another. And Hut. Angel and the City of Londons Case, the Court would not meddle with the Fee upon a Fee, as it seemeth by that Case to be; but here is an express Devise for life. Mallet and Foster to the same intent. Most Settlements of Marriages are upon Contingents, and therefore great care must be had of shaking them, M. 11 Jac. per Coke Ch. Justice, There are more perplexed constructions in Wills than the Estates of the Will are worth to unfold, and therefore the nearest must be to the intent of the Devisor, so as it consists with the Rules of Law; he agreed the Cases and Authorities above-cited; because as Contingents are not lightly to be shaken, so should they be suffered, they would introduce greater Inconveniences of perpetuities. This Case differs not from Archers, or Nichols Case, Pl. Com. and whereas in Lampets Case it is in ambiguo whether it fall or not, then it is in Contingent till one dye without Issue, and no act of the Tenant for life can destroy or hinder it.

Judgment for the Defendant.

Gould *against* Dela Bar. Ante.

IN Arrest of Judgment (Wild Recorder for the Plaintiff) the Mony was due only to Wood and not to the Plaintiffs, and so no Consideration; but (by him) it doth appear there is a Duty due to the Plaintiff on which the Mony of Wood depends, and the Defendant is to have benefit of this by withdrawing and forbearance of the Suit. 2. It doth not appear that the Mony attached was Mony due to Wood for the fraight but as the Mony of the Plaintiff, and Starkie *against* Miln, Trin. 1651. Rot. 701. B.R. R. Grandfather of the Plaintiff and Defendant delivered goods of the value of 20 l. to the Defendant in consideration whereof the Defendant promised to pay to the Plaintiff after the death of R. but by Just. Windham in this Case it was. H. hath issue a Son and a (30) Assumpsit.

Daughter, and would give Goods to the Son and the Mony to the Daughter, and in consideration of the Goods the Son promiseth to pay to the Daughter after the Fathers decease; which Twisden agreed. H. promiseth to the Father to make a Joynture to the Daughter, she shall have the Action, for she is to have benefit of it, as 12 Jac. Odeham *against* Badenham. Windham & Curia very much doubted of this Consideration, 24 Car. Evans *against* Jamney; and by Rolls, If A. sells goods to B. and B. in consideration thereof promiseth to pay to C. that shall be intended as Attorney to A. and A. only may have the Action, and C. shall never have it unless some special matter appear; and here it doth not appear that the Defendant intended to promise to Swinnock. Twisden, Remember the Case of Evans and Jamney, which in consideration A. hath bought a House of the Defendant, the Defendant promised to pay to the Plaintiff, Son of A; here A. only can have the Action. Otherwise in Case of a Marriage, agreement betwixt parents for their children, (Sprot *against* Aggot) the Action may be brought by either; if this Case had been in Consideration the Plaintiff would procure Swinnock to remove his Attachment it had been good; but as this is 24 Car. Rot. 1010. Dishborn *against* Donabys Case, is not to the purpose, and so he inclined, that this was no good Promise, being not so much that Swinnock at the request of Gould would forbear.

Adjornatur.

Web *against* Bettenham.

(30) Condition.

BEar Serjant moved in Arrest of Judgment in an Action upon the Case, upon a promise to seal when he should be requested such Instruments as should be tendred to him, and by him the tender must be of Wax, Ink and Pens, and necessaries to seal. 2. It is to be according to such Draughts as were betwixt them agreed; and its said, he did tender Secundum tractationes, Angl. *Draughts* prædict', but doth not set them forth in hæc verba, which being after non Assumpsit is not material, 16 Ed. 4. 9. was upon Demurrer, which the Court agreed; but a Verdict presumes that the Deeds were shewed. And 3. the request was two days after the tender, which by the Court was well done, for he is not bound to seal them on the sudden; but the promise being not to convey Land generally, that must be by Counsel, and so the party must be requested; but when it is to be done according to such and such Draughts, there all must be done by the party promising at his peril; and also

also if it had been only that he tendered to the Defendant, and requested him to Seal at another day, that had not been good, unless he shews (as here) that he left the Writings with the Defendant to peruse; for else he might request when he had not the Writings present. 4. Allen, There are sealing of Writings and Conveyance of Title to a Reversion to be done, and the Breach is alledged that he hath not sealed, nor the Reversion conveyed, and doth not say that he did not seal two Instruments according to the Draughts drawn, or none, but per Curiam other Instruments then according to the Draughts cannot be tendered, and the Defendant should have shewed that the Draughts were not according to the Draughts, Manners Case, for after Verdict all will be intended well.

Nota, That after the discharge of the Court a Bail Bond shall not be discharged, unless they pray'd it upon the Declaration, by rendring the Principal. (31) Bail.

Smart *against* Edsah, Ante.

Winnington for the Plaintiff in Scire Facias upon a Judgment against two after the death of one against the Survivor, not naming the Heir of him that is dead. And by the Common Law upon such Judgment in Debt, 3 Co. 14. Harberts Case, the Charge should survive: And the Statute of Westm. 2. that giveth the Elegit tolls not the privilege of the party at Common Law, because it was made for the Plaintiffs benefit: and 29 Ass. 37. Age Br. 36. giveth no reason of it; but 29 Ed. 3. 39 per Thorp the parol shall demur, because the Lands are all equally lyable, Error, Br. 191. So that that Judgment only considered, the Land (or real) not the personal lien: In the point of this Case are 1 Ed. 3. 13. pl. 41. 3 Ed. 3. 11. pl. 31. and the difference is betwixt the lien real, which must be equal, and personal, which may be of any of them, Com. 440. Davies *against* Peepes, 11 H. 7. 12. b. Windham agreed to the Authorities cited, and Langfords Case was upon the real lien; which Twisden also agreed, that a Warranty real will not survive personal will, 1 Inst. 469. and so of such Kind of Charges F.N.B. 166. upon Execution sued in Chancery before the day, or for more than the Judgment, 44 Ed. 3. 10. 10 Ed. 3. 20. b. pl. 18. so when no Condition is broken: but this cannot be done after Execution returned without Audita Querela, 17 Ed. 3. 3. a. b. pl. 10. & 11. H. shall not be put to an Audita Querela, but upon shewing the (32) Debt. Fitzh. 7. Scire Facias.

Indentures or Judgment in the Chancery he shall have a Superledeas of Execution. Wild Recorder for the Defendant. Upon a Scire facias the award must be to have Execution as the Law will, viz. against either in the personalty, or against all in the realty, and so shall charge the Heir not named, and put himself to two Writs, which he may do by one, which the Court denyed, and that by this personal lien he hath waved the benefit against the Heir by an Elegit, but it is in his Election which he will have, the Heir having Assets by discent (by the same Writ) for the same Writ must be Executed against all in one manner, 37 H. 4. 30. 4 Ed. 4. 39. Judgment for the Plaintiff.

. . . . *against* Bowden.

(33) Tryals. KEeling cited Williams Case, that a new Tryal for Perjury hath been after Conviction, but per Curiam that was by consent, but upon an acquittal which was moved, Windham conceived none was ever had but by consent which the Court agreed, though this was only by defect of a Copy of a Bill in Chancery, wherein the false Oath was not in any of the Records, and a Verdict against the King only, because he could not be nonsuited, nor can he have an Action upon the Case.

(34) Bail. Nota. By the course of the Court upon Bonds of vast Sums to perform Articles in debt for Non-performance may be common Bail, or according to the value of the Breach assigned at the discretion of the Judges.

Ellis *against* Yarnly. Sinderf. 60. pl. 19.

(35) Trover. Stiles 31. pl. 74. TRover and Conversion pro duobus Pullis, which Allen moved in Arrest of Judgment, was not sufficient without an Anglicè, which the Court agreed. Post.

Daniel *against* Turpin.

Oct. 28. Simon and Jude.

(36) Slander. THou art a forsworn fellow, and we (Husband and Wife) will prove thee one, and thou canst have no benefit of the Law. Judgment arrested, because the words were not actionable, especially being alledged to be spoken by Baron and Fem.

Beesly's

Beeſlye *againſt* Walker. 1661. Rol. 341.

IN falſe Impriſonment, Mallet moved in Arreſt of Judgment after Verdict, 8 Co. 2. Leonard. 41. pl. 108. Crogates Ca. 67. becauſe there was Juſtification by Arreſt, by vertue of a Warrant of the Sheriff upon a Latitat; the Plaintiff replies, de injuria ſua propria; upon which iſſue was taken, which though it had been naught upon demurrer, (being matter of Record) is not ſo per Curiam after verdict, as Osborns Ca. cited per Twiſden, Adjornatur, 22. Car. (37) Iſſues. 3 Cr. 844. pl. 30. 3 Cr. 854 pl. 16.

Welden *againſt* Johnſon. Sider. 48. pl. 8.

THou art a Knave, and a Cheating Knave, and I will prove you a Cheating Knave; without any ſpecial Colloquium or Damage, moved by Serjeant Raunsford in Arreſt of Judgment, and Ruled not Actionable. (38) Slander.

The King *againſt* Lepington, &c.

WHereas I have been informed by the Commiſſioners of Excise, that the Defendants Subcommiſſioners lately have Sums of Money in their Hands, the Warrant was to go to their Houſes, or any where elſe, to attach them, and bring them before the Treaſurer to anſwer, which Keeling Serjeant prayed might be filed without further mending, by three days, which the Court granted being only for Appearance. (39) Impriſonment.

Delabar *againſt* Yardly. In Error. Br. 90.

BAldwin, after a Writ of Error, prayed an amendment that the party and his pledges ſhould be in mercy, and by him it is frequent that the Sum of the Judgment hath been amended, which by Windham is only in a toto ſe attingent miſtaken, but a Miſericordia for a Capiatur can never be amended, but predict. Tho. for Will. hath, and ſo (ſhall Recover) for (do Recover.) But per Curiam, that was upon the Tranſlation of the Latin Recuperet into Engliſh, upon the Act heretofore made, but they conceived that this is part of the Judgment, and not Surpluſage that the Pledges be amended, 10. Jac. Ayms Caſe. Poſt. (04) 2 Leond. 4. pl. 4. 2 Cr. 213. pl. 7. 2 Leond. 177. pl. 217. 16 & 17 Car. 2 Cap. 8. 2 Cr. 76. pl. 7. Pleadr. 580.

Peg.

Siderf. 49. pl. 10. Peg. *againſt* Waters.

(41) Noſme. DEbt upon a Bond for performance of Covenants, among which was one that the Defendant was ſeized of a good Eſtate in fee, upon which iſſue is taken, and Verdict, after which Newdigate moved in Arreſt, that the Defendants Plea was predict. Edward did Covenant that R. was ſeiſed, whereas the Defendants Name was Robert, that did covenant: which miſrecital per Curiam is not material, becauſe here is a good affirmative, and the Bond, if this be miſrecited, is ſingle. Contrà, if it had been in an Action of Covenant, or when the Indentures by Prayer of the Defendant is intred in hæc verba, for here by Windham it appears that the Plaintiff hath good Title.

Siderf. 49. pl. 14. Lanes *againſt* Whitmarſh.

(42) Intendment. JOnes moved in Arreſt of Judgment, in Action upon 2 Ed. 6. for Tythes, the Plaintiff ſheweth he was farmer of part of the Tythes, which implyeth ſome other is intereſſed and ſo they are Tenants in Commom and muſt joyn; upon nil debet, it is againſt the Defendant, when a Tenant in Common doth bring an Action againſt a Stranger, 1. Where one brings it againſt the other for that is in Bar, and per Curiam after Verdict it ſhall not be intended that the Moityes were in common, in this caſe the Moityes will diſcend to the Heir, which per Twiſden cannot joyn with the Survivor. 2. The Breach was, that the party did not ſet out the tenth to me, which is Surpluſage per Curiam. Foſter, If two Parceners be of a Parſonage, when one brings an Action for the Tythes of a Moiety upon nil debet found for the Plaintiff, ſhe ſhall have Judgment though of her own ſhewing (as here) ſhe hath but a Moiety, and per Windham though Parceners and Tenants in common muſt joyn, yet when a Pariſh is divided there is Moieties, yet each ſhall have the Tenth; though generally upon medietatem found it ſhall be intended in common. And by Twiſden, if two Tenants in common of a Rectory and the one be Outlawed the other muſt declare of his Moiety though this Action be but for a kind of Contempt. 3. The Plaintiff hath entituled himſelf only to a Twentieth Sheaf divideds, and yet Aſſigns a Breach in not ſetting forth a Tenth, which by Jones is not ſufficient, but it was ſine Extrapoſitione Decimarum; and by Windham a Tyth may be of a Tenth part as well

well as of a Tenth, but the Postea was for not setting forth both the Twentieth and the Tenth. Adjornatur.

The King *against* Read Siderf. 49. pl. 12.

IN an Information of Perjury and Conviction found Twisden doubted whether the party can have a new Tryal, Rege Inconsulto, and the Court agree they cannot give it in an Action of Debt, or upon the Statute, which is private betwixt the parties. Post. (43) Tryals. Nor shall the King have new Tryal where the party is acquit.

Walker against Gibson. Ante.

IN Debt upon a Bond upon Oyer of the Condition the Defendant pleads Covenants performed, and doth not set forth the Indenture, which per Curiam upon demurrer he ought, and if he have it not, he may move the Court, and have a Copy thereof; though per Twisden it hath been vexata Quæstio heretofore who should set it forth. (44) Monstrans.

..... *against* Wood.

THou art a Strumpet and a Drunkard, and a Whore, and thou dost usually steal a pound of Wool at a time beside Yarn, from *J. S.* Adjudged actionable. (45) Slander.

Pavie *against* Hall.

1 Lev. 3. S. C.

IN Debt upon a Bond for performance of Covenants, J. and A. were named in the Bond, but the Indentures as pleaded were only betwixt J. of the one part and the Defendant on the other; but were re vera betwixt J. and A. on the one part, and the Defendant on the other, and on (2 Cr. 38. pl. 18.) Warrant of Attorney for satisfaction of Judgment had against A. which was against A. and B. or by A. which was by A. and B. is good, but not contrary. Indenture made by A. and B. is not good, as deed of A. sole 29. Ed. 3. 23. pl. 13. by Belknap Feoffment of 4. is not maintenance of one by 3. nor Contrà. So of Cessavit of 6. which is but of 3. Acres, 10 Ed. 4. 2. pl. 2 per Littleton. Upon Demurrer by the Plaintiff, Jones moved that it was a naughty Plea. Adjornatur. (46) Varians. In Bar. Fitzh. 9. 3 Cr. 56. pl. 5. Assize Br. 84. Dyer. Receit is said by the hands of A. and B. it is not good if by A. only, 1 e. Ed. 4. 5. pl. 10. Fine by two is the Fine of one. 2 Co. 74. b. post 167.

Mas-

Maskalt *against* Chirkall.

(47) Slander. UPon Error of a Judgment in the Common Pleas, saying of a Widow at one time, Your Daughter is a Whore, and a Pocky arsed Whore, adjudged Actionable; and so to say H. is a Whore, and hath wholes in her Legs, I may turn my Fingers in them. And so when Pocky is coupled with such a word, that doth shew what the intent is. Judgment affirmed.

Ramsey *against* Atkinson.

(48) Assumpsit. IN Error to reverse a Judgment in the Marshals Court, neither of both being of the Houshold, which yet was not seen by the parties, but the general Error assigned, by which advantage was waived. 2. None of those that were named Judges did then sit in Court, when the Judgment was given; This was an Action upon the Case upon Assumpsit, that in consideration the Plaintiff hath bestowed his labour and pains within the Jurisdiction, about a House in Holborn, which doth not appear to be within the Jurisdiction: and by Twisden in a wager to draw Wood from such a place within, to such a place without the Jurisdiction, the Action cannot be brought within the Court; no more when any part of the thing is out of that Jurisdiction, but by Wild that case differs, for without performance no Action can lye, but here the Action is only for the labour and pains, and is not like where the whole cause of Action was assigned, out of the Jurisdiction of Bristow ad Damnum of the Plaintiff by losing his trade in B. that is naught. Adjornatur.

Siderf. 50. pl. 15. Broad *against* Hancock.

(49) P. 1661. Rol. 250. Slander. THe Plaintiff seised of a Rectory, and having exercised the Cure there, the Defendant swore of him, I saw the Plaintiff divers times in the Kings Army and amongst them, per quod he left his living, the Defendant pleads the Act of Indemnity, and that he was not guilty within two years, which being in a special Action upon the Case is not the just time of the Statute, but by Wild Recorder for the Defendant, though the Plea be not good, the Declaration is good, Ayers *against* Sedgwick, 2 Cr. 901. For the Action will not lye till the Defendant be convicted, Andrews *against* Cheeke B.R. accordingly adjudged for turning the River of Exon, P. 1657. and Danport and Simsons Case, 18 Eliz. and other-

ways

wayes none would come in the Crown side, but try all by private Actions: But by Williams for the Plaintiff, there is no other remedy in this Case, as by Indictment, 1 Cr. 355. Weld. Presentment per Curiam is in nature of an Indictment and legal proceeding, 1 Cr. 280. and by Twisden, when the Court before whom such Suit was, had no Authority, this Action will lye; but here the Defendant hath confessed they had an Authority, it was agreed that an Action upon the Case will not lye for false Evidence till conviction. And by Twisden 18. Jac. upon a Presentment or Indictment in Ecclesiastical Court, ex officio, no such Action upon the Case will lye: but by Twisden Perjury will lye upon false Oath before any that hath Jurisdiction.

Adjornatur.

(50) Williams Senior shewed cause against a Prohibition to the Sessions at Breckwork to the Court of Equity, which by Jones for the Plaintiff have no such Jurisdiction as North-Wales hath. 2. It was upon a Term extinguished by accepting another, by virtue whereof they awarded a Sequestration, Penelopie Owens Case, 27 H. 8. 26. which they could not do, but only bind the person by Attachment; the Court in Northwales is time out of mind, and the Statute is, that Justice shall be administred in Southwales as in Northwales, by colour whereof the parties moved Bagnalls Case, 3 Car. to hear them by Petition; but it was directed that Issue or Demurrer be made to the Suggestion. Adjornatur. Siderf. 52. pl. 17 Wales.

Burton *against* Gunnel.

(51) Error of a Judgment in false Imprisonment in C. B. Trespass and Assault against two, one is found guilty of all but the Imprisonment, and Damages 100 l. and the other is found guilty of the Imprisonment only, and 30 l. found against all, Ac quod dampna Recuperet, which Jones conceived Error, being pro misis & Custagiis against them all, which by the course of C. B. is well enough, Damna in the C. B. including the Costs: But by Twisden, Damna pro Custagiis, which though not warranted by Presidents, is good; and the Court conceived it well. 2. That the Writ was directed to B. Ch. Justice to remove a Record, Coram Foster & Sociis suis, and the Return is by Foster and Hyde only without Socio, which yet would not have been good, but the Judges should have been particularly named: A Certiorare to re- Error Br. 5. 3 H. 4. 4. pl. 16. Com. 593. b.

move a Record before J. Bradshaw Justice, Ante. And he certifies coram J. B. Chief Justice, and the party took out a new Writ.

Shepherd *against* Tomkins.

October 29.

(52) Count Br. 3 Cr. 57. pl. 6. 1 Brant. 10. pl. 22. 3 Cr. 507. pl. 32 Stiles 353. pl. 753. Godbolt 251. pl. 347. Com. 127. b.

IN Trespass its Entred quod cum prædict. &c. which by Allen was moved in Arrest of Judgment, and per Curiam it was staid. 1 Brant. 208. b. pl. 474.

Stiles *against* Trist.

(53) Process. Arbiterment Br. 24.

NOta, That when the Court refers the Cause by Rule to the Arbitrement of J. S. though it be Void, yet the Court will force the parties to submit to it, till it be avoided by Plea.

Cavenhurst *against* Cavenhurst.

(54) Covenant. 1 Brownl. 21. pl. 90. Godbolt 13. pl. 18. Moor 875. pl. 1223.

IN Debt upon a Bond for performance of Covenants, That the Grantee of part of a Term shall quietly enjoy, the Grantor dieth, and this Action was brought against the Executor. Bigland moved in Arrest of Judgment, that this Grant being of so much of the Term as shall be unexpired at his death, which (as Rector of Chedingtons Case, and Gravenors Case, Dy.) is utterly void, and so the Covenants which depend thereon are also void, as Yelvert. 18. Suffrain and Scarrads Case, and so of a Warranty annexed to a void Feoffment: And

Noy 15. Br. 6.

here both the Bond and Covenants waited on the Interest, as Obligation Br. 6. Jones for the Plaintiff agreed the assignment of the Term void, but this is a Covenant by it self, and that Breach assigned in entring on the Grantee by the Executor of the Grantor: And the difference by Windham is where a Deed is void in the Fabrick, there the Covenants on it are

3 Cr. 77.

void, as when a Freehold is to commence in futuro, and where there is only want of interest in the party Grantor, but that Deed is good, which the Court agreed. And by Twisden a Warranty must have an Estate, contrà of a Covenant that may be alone. 2. The Condition of the Bond was to keep

Hetly 56. (Sen. 54.)

and perform all Covenants generally, which being void, the Bond is single, by Jones and by Foster, if there had been no

1 Brownl. 57. pl. 301.

such Indenture, yet the Bond had been good single, & quacunque via data, the Verdict being against the Executor, whether

ther the Covenants be good or void, the Plaintiff having shewed title, he shall have Judgment, Owen 110.

Judgment, nisi. 367. pl. 371.

Declaration of a long time, as 20 years since, and not filed, cannot be entred without motion to the Court. (55) Suggestion.

Lindly moved to quash the Indictment for wanting ad tunc existens liberum tenementum, being only that he entred super possessionem, &c. also per Curiam it ought to have alledged a forcible Entry, and not only a forcible Detainer. (56) 3 Cr. 754. pl. 16.

Dr. Withringtons Case, Ante.

Allen against the Return that its insufficient, 1. In that its said the Master and Fellows became bound to W. in a Bond not to renew a Lease, and that afterwards at the Defendants request, asserting he had obtained a Release of the Obligee, they did renew, and the Defendant was present, whereas either he had not obtained any, or refused to deliver it upon request, by reason whereof the Master and Scholars improbè illaqueati fuerunt, per Finch, Angl. trapand, but the Court had ordered the word to be amended; but this is no certain Allegation, and if it were, it was but that he said so, which is no cause to turn him out, unless he some ways convert it to his own use, nor is the College really prejudiced, but only in particular, and it was in the time of a predecessor Master. 2. Its said that H. gave a Pension to the College for a Preacher, and that Dr. W. was appointed to that Office, but that he did not preach any of the Sermons, but that he fraudulently did make default, and agreed with the Heir to take the Pension in his own name, which was (1645.) when the Doctor that had it was sequestred, and allowed it by Dr. W. the thing admitted is not any offence to the College, because they had no inheritance in it, nor can default of preaching be any cause to lose his Office; and it is only said legitimè autorisatus, and do not shew how, and the Pension was to cease by not preaching, and so could not be purchased. 3. Its said he cracted of one M. for one Quarter more than the Commons did amount to, and divers Sums of money of others, procuring false Bills to be made by the (57) 1 Brant. 23. pl. 67.

Manciple, which begins 1653. and its not said that he knew that they were false; and exacting is but a demand, unless it appear it be paid, for these causes he was expelled 1661. And 4. its said, being herewith charged, he went away, and being lawfully summoned and required to answer, refused and run away from the Examination of the Master and Colledge, and affirmed he would not submit, but obstinately and finally persevered; wherefore they removed him, but the Statute which gives this liberty, if for the honour or profit of the Colledge, doth yet suppose they must shew certainly how it is to the dishonour of the Colledge. As to the Appeal which is only licebit ei appellare, and doth not conclude him from any other way, another Statute appoints other persons to expound doubts, but not to judge of offences; for they have no Authority to restore, and also that Cause relates not to all their Causes, but only to such Crimes, inter Majora that are grievous, but in this Crime the Statute is express, and the Clause of Appeal relateth not to this. Maynard the Kings Serjeant for the Colledge, the Return is said ad Damnum as well as Periculum: but he insisted on the last Exception, that he made default upon the Summons and the Appeal, and that such Writs have not been heretofore brought; therefore they lye not as Litt. upon the Stat. of Disparagement, & many things may be fit to be punished in Universities, which are not fit to be examined here, and the Consequence hereof would make this Court Visitors of all Colledges. 43 El. gives away for correction of Charitable Uses, and after Appeal to the Chancellor, there is no other remedy; so here the Appeal of Colledges being naturally to the Ordinary, and better there should be no remedy for such injuries (as denyal of Legacies, or for calling women Whores, &c.) then let in greater Inconveniences which would necessarily follow; Bourman of the Temple was denyed a Writ to be restored to an Inn of Court, there being none to whom such Writ can be directed therein, being a voluntary Society; and so he conceived here. Finch to the same intent conceived, that peradventure if they could have no other remedy on Appeal they might come hither; but as Dr. James, Hub. 17. not per saltum come hither first, but must observe all the Degrees of Appeal, Herns Case, which was the first Mandamus was granted, was only because there was a failer of Justice, the Arch-Bishop being their Visitor, but here it is not so, and there Glyn granted it only because he found it. 2. The Writ is mistecited. Baldwin to the same intent. There is a local Visitor, and therefore this Court cannot have Conusans, and the licebit appellare is that he is not forced to Appeal, but if he doth he must appeal to such persons as ap-

Jurisd. 3 Cr. 521. pl. 48. Hub. 56. b. L. Co. 81. ob.

appointed by the Statutes, though at the Darrein resort, they might have come hither, P. 1653. Jones *against* Wilmot, Error to reverse a Judgment upon 2 Ed. 6. which by 34 H. 8. is directed to be brought in the Marches, and by Roles shall not be brought here first. 5 Ed. 6. Error F. 89. per saltum: but by Foster and Witherington for the Dr. the Court hath admitted the Writ already. Windham conceived the pinch of the Case to be, whither any Appeal lyeth hither at all, per saltum or gradus where there are local Visitors or Eleemosinary gifts, to a Spiritual end, (Linwood de Relig. Dom. 660. Episcopus) and he conceived Licebit, as Baldwin said, and in this Case he might have appealed (if there had been local Visitor) to the Ordinary, and 8. Assize and 8 Ed. 3. are both against the Defendant being upon a deprivation, and thus Coneys Case in Dyer, an Assize doubtless will lye for the Master of a Colledge, but not upon a deprivation, Hunts Case, he being deprived could, not be here restored, (7 Co. 43. Kens Case) this Court being not able to judge of the particular Laws, otherways then by the Law of the Land, he conceived the Writ grantable, because it is not certain what it is before the Return; and Twisden to the same intent, 15 Jac. Dr. Lewis Case, he was chosen Master of Oriel by one number, B. by another, L. appealed to the Bishop of L. being local Visitor, and was confirmed, the Archbishop to whom B. appealed confirmed him, and L. appealed to the King in Chancery, wherein it was resolved That the Appeals to the Archbishop and the King were both void; and the local Visitors confirmation of Dr. Lewis good.

Vid. the Case in Whitlocks Reading Divis. 3. point. 9. fol. 40.

Adjornatur.

Rawlins *against* Marsh.

IN Trover and Conversion for all the Goods in a House which the Plaintiff possessed, excessive Damages being given: Finch moved for a new Tryal, paying full costs and giving a Judgment for security, though he hath remedy by Attaint, and it was granted (nisi) without Certificate of the Judge before whom the Cause was tryed. (59) Tryall. Stiles 466. pl. 1046.

Fitz.

Fitz. *against* Smalbrook.

(60) Livery. IN Ejectment S. had a Sister who had Issue Ezech. Susan had a Son, Ezech. hath Issue Eliz. who hath Issue the Lessor of the Plaintiff, Susan dyed without Issue, the Defendant claimed under the Son of Susan. In Evidence to a Jury, it was observed, 1. The Title being waived as Heir, the Plaintiff claimed by a Lease for years from the two Sisters and their Husbands; which being delivered upon part of the Lands, whereof there were several Tenants for years, was allowed to be good for the whole. Contrà If there had been any Tenants for Life of any parts. 2. A Witness having been Tenant of the Lands, and having sold his Lands a week before the Tryal, having been summoned as Tenant in possession, which subjects him per Curiam to an Action of Trespass, but he had an under Lessee in possession, and so only subject to an Action upon the Case, but because he claimed paramount both Plaintiff and Defendant, he was allowed. 3. The Witness was Convicted of perjury, which by the death of the Protector was kept from Judgment, and therefore no exception against his Testimony, which made the Counsel of the Plaintiff offer it against his credit after his Testimony given. 4. This verdict being null'd it cannot now be given in Evidence, either to disable or disparage his Reputation, for it is but an Information and must be here proved de novo by Witnesses: But by Allen had the verdict been defective in point of the drawing, yet it might have been given in Evidence, but per Curiam all these proceedings are Coram non Judice, and only confirmed by the Acts of Judicial proceedings as to Acts past, not to have any validity in futuro, and by the same reason, such verdict may be given in Evidence, the acquittal also might; and so the Court should ravel into another Cause, which they would not. 5. The Deed under which the Defendant Claims was with power of Revocation, but no Counterpart sealed, which (though at first doubted) was conceived good enough.

Morgan *against* Wells. October 31.

(61) Verdict. IN Evidence to a Jury it was observed that the Action being Ejectment of a Manor, and certain quantity of Acres, to part whereof the Plaintiff had no Title, wherefore by consent the verdict was of the Manor, excepting that part, and not generally of the Manor, and that part only by Rule of Court, not to be executed.

Travis

Travis *against* Meers. Siderf. 57. pl. 25.

ACtion upon the Case upon a Promise; Allen moved in Arrest of Judgment, in consideration the Plaintiff could make it appear that her Husband was indebted to the Plaintiff, she would pay, &c. The Plaintiff said he was always ready to make it appear, which is not sufficient, unless he were indebted, nor then, unless she had been Executor to her Husband. Hume *against* Hinton cited by Rolls, Tr. 1646. Rot. (1651.) in consideration the Plaintiff would stay till Michaelmas, H. promised to pay, which was adjudged good, though he was neither Executor, or related to him, Smith *against* Jones, Tr. 8 Jac. Rot. 182. H. died in Debt to the Plaintiff, whose Goods came to the Testators Wife, which marrying to the Defendant, in consideration thereof, and that the Plaintiff would forbear, he promised to pay, and adjudged sufficient; contrà when the promise is to forbear the person, then he must be charged as Executor. Wild for the Plaintiff, The consideration is grounded upon the making appear, which is trouble and pains: And by Windham to shew a Bond is a good Consideration, and the Consideration of proof is sufficient, Gold *against* Death, Hub. which the Court agreed, and that Consideration to bring an Action, and prove the Husband was indebted, was good; and so they conceived that paratus est manifestare, is good enough after Verdict upon Non-Assumpsit, and a special Averment of Manifestation would not have been sufficient. Adjornatur. (62) Proof. In Condition Br. 151. Stiles 304. pl. 661. 2. Leonard 215. pl. 273.

Denzel Hollis *against* Edsah.

COunt upon a Demise at will, Jan. 12 Car. and brings Debt for half a years Rent ending at Lady-day 13 Car. which was within three Months, which the Court over-ruled naught. (63) Count Br.

The Case of Clements Inn.

THe Master and Society moved for restitution to a Chamber upon a forcible Entry, which was granted, but the Court would not meddle with the Cause, but ordered the young men to submit, and appeal to their Inn of Court, and thence to the Chief Justice, thence to the Lord Chancellor, and they allowed a Society may seize a Chamber for Non-residence, or want of Commons of any man, and would have (64) Jurisdiction.

have laid one or two of the Assistants by the heels till Restitution and Conformity, but would not determine the Right of any Chamber there; but unless possession were delivered this day, they ordered a Tipstaff to do it.

The King *against* Lepington. Antè.

(65) Execution. THe Counsel of the King desired that L. might be charged in Execution, which the Court denied, because it is an indirect way, as to arrest till they have a Warrant; and though the Warrant was only for appearance, yet the Court would neither file the Retorn, nor bail the Person, until the Kings Counsel (absent upon other occasions) were heard.

Slebb *against* Smith.

(66) Slander. SErjeant Merefield moved in Arrest of Judgment, Thou hast stoln our Bees, and they are hidden under the old womans Hempstalls, Thou art a Thief: Upon Justification it was found against the Defendant, and on 43 Ed. 3. Property Br. 37. except that Bees are feræ naturæ, and so no Felony, & innuendo a Stock of Bees will not help, 4 Co. Barhams Case, and these singly is not sufficient, Hub. 77. 331. Clerke *against* Gilbert, till H 8. his time, as Hub. and Winch said in Lanes Case in the C. B. which he observed; but now the Law is otherways, but is here qualified with the precedent matter, and the Justification alters not the Case if the Count be insufficient. 18 Jac. Rot. 1755. K. is a false forsworn Knave, and took a false Oath against me at a Commission at Edgham, after Justification ruled naught; and there it was resolved that H. may be forsworn before Commissioners of the High Commission.

Mr. Stroud, Senior, admitting the Cases before, yet 1 Cr. 52. there they were (2 Cr. 39. 3 Jac. 2 Cr. 114. 231.) supposed to be fixed to the Freehold, and have been also adjudged since contrary, but Bees are not so; and by Windham the constant difference hath been where Thief is coupled with such words, and where not; as you stole Turnips is not actionable: But you are a Thief, and have stoln Turnips, is actionable, and so the Court conceived here. Twisden cited a Case of a forsworn Fellow, justified by an Oath at Guildhall in a Tryal ruled actionable by the whole Court, and so Rolls in his time, though Bacon to the contrary, with whom Foster here agreed; and Windham conceived, that if it were impossible for the former words to support the latter, the words are not actionable, but

but contrà where they may support such latter words. Twisden, Thou art a Whore, and hast had a Bastard, and that will appear by a Chain and a pair of Cive, Adjudged actionable. And so here adjudged for the Plaintiff.

An Action upon the Case for Counterfeiting a Will, after two Trials in Ejectment affirming it, Dr. Ates Case by Twisden was the first of this kind; and Jones moved to change the Venue, which was granted. (67) Forgery.

The King *against* Trinity House. Siderf. 54. pl. 21.

November 4.

After Demurrer by the King to a Plea to a Quo Warranto, the party before he hath joyned in Demurrer, may by the leave of the Court mend his Plea, because all is in Paper till then. (68) Amendment.

The King *against* Anguish.

Baldwin moved to quash an Indictment of Perjury upon the Act of poor Prisoners, That the Defendant had taken a false Oath before William Steel Justice of Peace; also the title of the Act was English, and the Indictment is Actus titulatus, Actus, &c. and the Court agreed that a Latin title may be of an English Act, if it be proper Latin, but contrary where the Latin is not according to the English; and this was upon a Plea, and removal of the Presentment before Trial, wherefore the Court would not quash it. (69) Parliament.

Barrington *against* Venables.

H. After Imparlance, pleaded that he was one of the Kings privy Chamber, and by the Law and Custom of the Realm, ought not to be sued in any Court of England without his consent, but only by licence of the Lord Chamberlain first had, which was intended to the Jurisdiction of the Court; but the Court conceived it without colour naught, and enquired the Counsel that set his hand to the Plea, to have punished him. 2. The Plea was Venit & Defendit vim & injuriam, and doth not conclude, demanding Judgment, si Curia cognoscere velit, which is also naught. (70) Priviledge.

The King *against* Read. Ante.

(71) Indictment. Action upon the Case for false Prosecution, 364. pl. 61.

ALlen moved in Arrest of Judgment in an Indictment of Perjury, because by any thing that appears, it is only a Recordatur, having no express Averment, whereas there should be beside the Recordatur in hæc verba, some distinction of the Matter of Fact from the Recital by Record. Wild for the King, The Recordatur refers to the whole Matter of the Record; and it is said & quod prædict. Defendens being testis productus did swear falsly thus, which is well without shewing the particular by any ulterius dat informari of other Matter of Fact: But the Court inclined that it was a plain fault, and being testis product' doth refer to the Recordatur.

Adjornatur.

Siderf. 54. Stiles *against* Trist. Ante.

(72) Attachment. Arbiterment. Br. 24.

FInch moved for an Attachment upon Breach of a Rule of Court to submit to an Award, which Wild for the Plaintiff said was primæ impressionis, and that the award it self was void, and so no submission could be forced, It was that the Defendant should have Goods, paying so much money, which by Wild is Conditional, and no remedy for the Plaintiff to have the money; and by Twisden upon a Rule to give Bond to submit to award no Attachment lyeth, which Finch agréed; but here the Rule of Court is the only Security the parties have for performance of the Award: But by Windham no Attachment lyeth upon this Rule, but an Action of Debt may be brought for the Money, and then the validity of the Award will come in question, and he conceived the payment voluntary, and not to be compelled, and per Curiam very few References have had any effect: And by Wild, when the Rule of the Court is for doing a particular act, an Attachment lieth; but contrà where it is generally to submit to an Award: And by Twisden, the making such References part of the Rule of Court is not above seven years old; and he remembred a Case wherein he was Counsel where Attachment was denied, and so it was here per Curiam.

2 Leonard 167. pl. 203.

Slany

Slany *against* Egerton.

November 5.

HOwel moved in Arrest of Judgment in Trespass, for cutting up duo testa, Angl. Floodgates in S. whereby the Water could not come to his Mill in Chester, to his damage, which being intire, and part arising in one, and part in another County, an Assise of Nusance may, but an Action of Trespass upon the Case cannot be brought in Staffordshire, 7 H. 4. But the Court conceived according to Bulwers Case, That it is well brought, and it cannot be forced to be in the County Palatine of Chester. (73)

Burton *against* Laffel.

November 6.

IN Evidence to a Jury, by Twisden & Curiam, the possession of Lessee for years is not the possession of Cestuy in Reversion, unless he hath a lawful title Br. Leases, that the entry of Lessée for years should help a discent where the Lessor had no title, is an exploded Opinion; and without an actual Entry of Cestuy in Reversion upon the possession no discent can be cast: That nothing can be parcel now that was not so in the time of H. 8. and Embers Case, L. Entr. for betwixt the King and his Grantee proof must be made thereof by Record, and here cannot be betwixt other parties by other common Reputation, that the Land was parcel of the Priory of M. (74) Descent Br.

THis Day to the Grand Jury of Middlesex, being three full Juries of 24, Mallet first delivered some Articles of Charge, 1. Of Treason. 2. Of the Establishment of the Church, so far as it hath any influence on the Government. 3. Of Murders, Felonies as well on the Land as the Thames, as also all other notable Crimes, Sacriledge, or Burglaries of Prisons, and that they be kept in due order. 4. All Houses of Resort, that they keep reasonable times and order. 5. Extortions of Officers, especially in publick places, and whatever other Crimes they themselves know of. 2. Twisden in Confirmation, that they enquire of Woods, Writings, &c. and secure the Head, without which the Members cannot be well. 2. Innkæpers exacting too great Rates, which they (75) Charge.

knowing, must present without any Information: And by Windham this was the first Article in Eyre, and in this Court; and the Court must see it remedied, as also the High-ways, and that the Waggons of too great Draughts are Nusanses, and ought to be presented upon the Evidence barely of finding a great company of Horses in their custody loose, or riding on them, 21 Jac. It is holden that this Court is out of that Statute, and so they come off for Fines. The Jury were desirous to have presented Travellers or Watermen, or others working on the Sunday; but by Windham that Offence is Spiritual, and by all, if they present not truly things they know, the Court may impanel another Jury to enquire of their Defaults.

(76) Slandre. Siderf. 52. pl. 18.

Dacy *against* Linch. Mich. 13. Car. 2. Rot. 1875.

D. is a Witch, and deserved better to be hanged than W. A. (who was hanged for a Witch) to which the Defendant pleaded the Statute of Limitations, to which the Plaintiff replyed, that he purchased a Latitat, 12. Febr. before the filing that Bill, to the intent to declare in this Action, the Defendant rejoyns that not guilty before the 12. of January before that Term, Hil. 16. Car. 2. when the Bill was exhibited after Verdict. Bear Serjeant moved in Arrest of Judgment in an Action upon the Case, that these words are not Actionable, M. 15. Jac. Rot. 635. Stone *against* Roberts, Thou art a Witch and an Enchaunter, and hast bewitched *Strongs* Children: Adjudged not Actionable, M. 8. Car. George *against* Harvy 1 Cr. 205. the like unless some person be thereby hurt, and Harris *against* Adams, 9 Jac. C. B. that *H.* deserved to be hanged, it is but a Collection from the former words, and will not make them Actionable. 2. The Replication is not good, and so no Issue, this Court proceeding not upon any Latitat, and also it is no Original; but Curia contra, and that this is the constant course of Pleading; and Twisden 10. Ed. 4. 7. said that when a Latitat was once purchased, it may be continued by the Attorney in his Chamber many years before the Bill, which being a principle, is not to be disputed for, contrary to 14 Ed. 4. Men may in these Actions alter the day of their Declarations in their Replications. But for the words, Twisden and Curia, the words Witch without special Act alledged to be done is not Actionable, and here Foster conceived the words Actionable, as well as H. is a Thief, and a strong Thief, and as very a Thief as any in *Newgate*, is Actionable, with averment that there is a Thief in Newgate, and by Wind. this is a stronger Case, the Defendant himself having said he was a Witch, and deser-

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ved to be hanged as well as A. which sheweth it to be spoken in the worst sense, which the rest agreed, the scandal being as great as if A. had been hanged, as H. hath kild I. S. is Actionable, unless it appear in the Declaration that he is alive, although he be revera alive.

Hale *against* Slingsby. In Error Br. 117.

November 7.

(77) H. after Verdict and also after the day in B. and before Judgment, dyeth without any Rules or Postea brought in (and here the Tryal being in London was ruled the same, and that) Judgment may be entred; but if the Death were before the day in B. it is Error in Fact.

Day *against* Gilford.

(78) The Court conceived, that in a Scire facias no party against whom Judgment is given can falsifie: Contrà of a stranger, Co. but whether he may falsifie in another Action, as Ejectment here; and Wind. conceived that he may by Action of a higher nature, as of Assize in Entry upon Disseisin; but this Ejectment is an inferiour Action. Foster cited Sir William Bowyers Case, that here the Heir should have pleaded at the Scire facias, Riens per discent; but now Scire feci being returned, it is too late; Twisden doubted whither ever he can falsifie in any other Action, as this Case is of the Recovery only of a Term. Judgment for the Plaintiff. 48 Ed. 3. 19.

Stephens *against* Bretheridge.

(79) IN Ejectment Special Verdict found, Sir F. W. seised in fee, in consideration of a Marriage with E. Ayre, covenants to stand seised to himself for Life, Remainder to her for Life, Remainder to the Heirs Males begotten on her, Remainder to Sir Fr. W. the Father, by a former Wife in Tail, Remainder to the Heirs of the Father, then they had Issue Sarah, who married the Defendant, and then they levy a Fine with warranty to the use of S. and then the last Wife, and Sir Fr. W. the Father dyeth without Issue Male by her, whereby the warranty descended. Allen for the Plaintiff. The question is whether this Fine be a discontinuance or a bar to Sir Fr. the Son by the former Wife, wherein he considered what Estate the Father had by this Covenant, whether an Estate tail executed in In Discontinue Br. 38.

in him and his wife, for then the Fine will be a discontinuance, but if not (as he conceived) then it cannot operate. And he said that the Estates are distinct and several as limited, notwithstanding that it be objected, that the Estates tail cover the Estates for life, and so the Husband and Wife are seised of one consolidate Estate tail: For 1. in this Case all the Estates are by one Conveyance. And Wescots Case makes the same difference betwixt one and several, 39 H. 6. 2. b. whence he concluded, That if Lands be given to A. for life, Remainder to A. and B. this Remainder is distinct, and mergeth not the Estate for Life of A. The like reason being for the Case at Bar: So an Estate granted to the Wife for Life, Remainder to the Husband and Wife in fee, makes them as distinct Estates as if the Remainder were limited to a Stranger, and the Case at Bar is but a degree farther, to the Husband for life, Remainder to the Wife for Life, Remainder to the Heirs Males which he shall beget on her Body, &c. are all distinct Estates. 2. If there be an Estate limited, equally limited to two, there if the Remainder be adequate to it, as to two, Remainder to their Heirs, these have no Remainder, Lewis Bowles Case, but one consolid Estate: But where there is a particular Estate for Life, and then a Remainder limited not answerable to it, there the Estates are distinct; as Estates to two, Remainder to three or to two, Remainder to them, Remainder to a Stranger; or to A. for Life, Remainder to B. for Life, Remainder to the Heirs Males of their Bodies, these are all distinct Estates, as in the Case at Bar; nor is there any Rule or Case, that when the Estates may stand severally is against it, but that they may be as limited, and the Freehold would else be confounded, and so upon devise they would have it divided, whereas he shall in such case have it for his Life.

2. Admitting the Estates as before, the Fine by Husband and Wife doth neither discontinue nor displace the Remainder to Sir Fr. the Son, Lit. 658. Co. 347. because they have not the Inheritance of the Estate tail, 1 Cr. 321. King *against* Edwards, is not like the Case at Bar, because there are no divided Estates but only to two, and the Remainder to the Heirs of one of them, and they took it without Moities, and so the Husband had one single Estate in fee executed, whereas in this Case, although the Estate tail vests in both, yet only as a Remainder, because their Estates are distinct for Lives by the former Limitation, and this Remainder is as a Remainder granted over by them. 2. This Fine taketh its full operation without harm to any, because an entire Fee passeth

seth out of the Conuſors, though made up of ſeveral Eſtates, which would paſs as well by a Feoffment, Bredons Caſe, being a lawful intereſt in the Grantor; but where there is an interpoſed Eſtate, as but for Life, Remainder for Life, Remainder in Fee, there ſuch a Fine cannot paſs without diveſting the other Eſtates, and ſo all Remainders are thereby likewiſe diſcontinued, 10 Co. 96. Seamors Caſe, Garret *againſt* Blizard, Enter H. 24 Car. 1. Rot. 983. A. Tenant for Life, Remainder to J. for Life, Remainder to T. in Tail, Remainder to J. in Fee, J. levied a Fine, which was agreed to be no diſcontinuance, yet it was ruled a Forfeiture, becauſe the Eſtate of the Conuſors could not make good the purport of the Fine; Trevillians Caſe, P. 29 Eliz. B. R. but here is no Eſtate deveſted; but it hath been doubted whether by Feoffment of Tenant for Life, Remainder in Tail, a Diſcontinuance be not wrought, but not of a Fine. 3. The Remainder in Sir Fr. will not difference the Caſe, but is as it were a mere Stranger. 4. The Warranty ſhall not bind an Eſtate, unleſs it be turned to a right, Seamors Caſe, but will determine with the Eſtate on which its limited. Winnington for the Defendant, A. ſeiſed in Fee, covenants to ſtand ſeiſed to the uſe of himſelf for Life, Remainder to his intended Wife for Life, Remainder to the Heirs of them two in Tail. 1. He conceived, That this Fine is a Diſcontinuance to the Eſtate Tail, Lit. Sect. 28. being not particularly limited to any of their Body: And 1 Inſt. 22. b. is where an Eſtate Tail is limited to the Heirs, they are Purchaſors, 11 Co. 82. That the Eſtate is executed in the Huſband and Wife is manifeſt, becauſe it is limited by himſelf; and ſo 38 Ed. 3. miſcalled a Remainder, for nothing veſted till the Inter-marriage, and then they are ſeiſed per mie & per tout, and ſo his Eſtate executed, notwithſtanding that the Limitation is to the Wife alſo; for it can never be more executed then it is, whichſoever dieth firſt, Shelleys Caſe, 1 Co. 98. Nor ſhall the heir be forced to make himſelf Heir to either of them, 3 Ed. 3. 31. F. N. B. 212. b. but unto both, 15 Ed. 3. Brief 324. 18 H. 6. 24. b. per Forteſcue: Elſe if one ſhould diſcontinue, the Heir would be remedileſs, and the Caſe of 1 Cr. is a ſtronger Caſe than this. 2. Admitting it is no ſuch Diſcontinuance as will toll an Entry, yet it is ſuch as will diſplace the Remainder, and conſequently the Warranty binds before Re-entry, 44 Aſſ. 35. 44 Ed. 3. 31. 1 Co. 67. 1 Cr. 103. although it doth not extend to the Remainder; and Seamors Caſe was only of a Bargain and Sale, upon which the Fine operated only as a Releaſe; 1656. Muſgrave againſt Scarf, Stiles 192. pl. 438.

C. B.

C. B. Bargain and Sale by Tenant for Life is no forfeiture: This Case differs from Bredons, in that the Estates might have been granted severally over; but not so here, because it is intire, and the construction of Law will not make them several, when their nature is not so. 2. In that Case the Remainder is in several persons, in this in the same, Pl. Com. 418. Bracebridge, and without displacing the Remainder, it would be no forfeiture. Windham conceived the Remainder distinct, and will not drown the Estates for Life, being by one Conveyance, else would all the Remainders be confounded; and if the Remainder had been to the Heirs of the Husband, he might have granted it over without Attornment, Co. But he doubted, whether being divided by construction of Law after a Fine, having the whole interest, he shall not be as a real Tenant of the whole, and Bredons Case, can have no answer. The Husband and Wife, in the Case of King and Edwards are Joyntenants, and not Tenants in Common: And one Præcipe must be brought against both, and so to some purposes it is executed, to some not. Twisden conceived it good for the Wives moiety, because there is no interposing Estate betwixt her Estate for Life and in Tail: But he doubted whether all having the whole interest, it shall be good, and no Discontinuance. And if Lands be given to two men, and the Heirs of the Body of one, who makes a Feoffment in Fee, which all agreed is a Discontinuance for a moiety: Foster supposed, that if they can any ways put the Estate out of them, it is this: All agreed the Warranty in this case will make nothing, because it is only upon the Estate Tail.

Read *against* Croston.

(80) Tryal. 1 Cr. 103. UPon a mistake material pro for and in Nisi Prius Roll, the Roll in Court being right on 2 Cr. 673. Jones prayed a new Distringas after a Nonsuit in Action upon the Case upon an Assumpsit, in consideration of cloth and payment, &c. whereas the Nisi Prius was for the payment, &c. which was granted.

Slany

Slany *against* Egerton. Ante.

GAwens Case Dy. and Bulwers Case both differ from this, (81)
because here is no dependant matters, but each are di- Lieu.
stinct and brought in several Counties, and so the Plaintiff hath no Election as in beating his Servant in one, whereby he lost his Service in another, or Reteiner in one and departure in another; because there he can have but one Action, contrâ here Twisden doubted whether, as this Case, any Action lyeth in Chester, 11 R. 2. and the Court (Foster absente) gave Judgment for the Plaintiff.

Austen *against* Mandre. Ante.

ERror Assigned that Execution was made by Precept to the (82)
Serjeants at Mace, without special Name, which per Cu- Error.
riam is the constant course. 2. The Error was to remove a Record before the Keepers in Curia nostra, which was in the time of Richard Protector, yet well enough per Curiam; for the Writ must be in Curia Nostra, but the Record must be certified as it is. Judgment Affirmed.

Ellison *against* Ellison. Ante.

November 8. Siderf. 70. pl. 8.

IN Misericordia, whereas it should have been Nihil de Mise- (83)
ricordia quia infans was amended in C.B. after Error assign- Amendment.
ed, in the same point and in this Case, in Debt upon a Bond Godbolt. 349.
against an Executor, who pleaded non est factum, which be- pl. 443.
ing found against him, Judgment was quod capiatur for Misericordia, which being in point of Judgment after Error brought was prayed to be amended, and by Twisden many defects in the Judgment, as Recovery of a Presentment to a Vicarage made to a Parsonage, &c. but Wild. for the Defendant alledged that in C. B. they have a Paper Book whereby they mend their Records. Adjornatur.

In Condition Br. 251. Travis *against* Meeres. Ante.

(84) Proof. ALlen for the Defendant shewed for Cause why Judgment should not be given for the Plaintiff. 1. That the consideration to make appear is not sufficient, for if by Action, such Action must be brought against the Executor of the Husband, and then if the Defendant pay not, an Action lyeth against her, but not before, if by any other manifestation the averment of always ready; is not sufficient as upon a Bond to pay upon imbezelment by an Apprentice, the embezelment must first be proved by Action against the Apprentice, 2 Car. C. B. admitting proof and manifestation to be the same Barr, F. 241. Fosters Case; nothing more manifest per Curiam, than that it may be by the same Action, and by Windham the Case of the Apprentice, is according as the intent of the parties, that he should be first sued, Allen agreed, that if there were any other consideration, then the Action would be sufficient: contrà where only to make appear and by Twisden where the proof is limited to a time certain; as two Months, there it cannot be intended by Jury, and the Court conceived the other a nicety. Post.

The King *against* Baily.

(85) Habeas Corpus. HE was brought by a Habeas Corpus, the Return whereof was for being, aiding, acting, and assisting at the Killing of the French Embassadors Servants, which by Sir Jeffery Palmer, & Curiam, is sufficient in a Return to suppose it Murder without the word murdravit. 2. When a Return is made, the party is committed only till the cause be determined, to the Marshalsea, the Prison of B. R. but after he may be remanded. 3. The Kings Attorney is to have notice and time to peruse a Return before it may be filed. Post.

Davie *against* Bear.

(86) Assumpsit. ACtion upon the Case for promise, 25 Novemb. 1656. there being Communication of Arrearages of Annuity of 15. per annum due to the Defendant, out of the Tenements of the Plaintiff, and in consideration the Plaintiff would pay tantas denariorum summas, as was due and behind until the day communicated from the date of the Indenture, the Defendant if he had formerly paid any before, the Defendant would repay so much, which by Bear Serjeant, for the Defendant in Arrest of Judgment is not sufficient, because it doth not appear, that the

the Annuity is continuing or of what Date the Indenture is, H. 7. Jac. C. B. Rot. 131. Kent *against* Prat, the Defendant seised of the Vicarage, and the Plaintiff of the Parsonage House, and strikes betwixt them, the Defendant in consideration the Plaintiff would surrender his House promised, &c. Judgment was reverst because it appeared not what Estate the Plaintiff had in the House, and to pay what is due will not raise a promise, 1 Cr. 5. Blight *against* Crasd. 2. It is said that the Plaintiff paid all the Arrearages being 188. pounds, which was impossible but some might be paid before: Aderton *against* Dunstan, 2 Cr. 247. The Defendant rejoyned that he paid 61. pound in four years, which was more then the Annuity; but the Record was of four years and a half, which was Just full: Jones for the Plaintiff consideration to pay what is due, is good though upon Bond; for it cannot else be had without trouble or charge, and Verdict being for the Plaintiff, and no exceptions taken against the payment before, the Court, conceived all the Exceptions without weight, the Date of the Indenture being needless; and though the Annuity was yearly to be paid, and so half a year cannot be due, yet the Terms being general after Verdict, the Court will intend it payable half yearly: and Twisden Cited the Earl of Northumberlands Case, Count in Debt by the Heir of Rent Arrear to him, though it might be in the time of the Auncester, yet after Verdict the Court will intend it due to him in his own Right. Judgment for the Plaintiff, Nisi. 1 Brant. 21. pl. 60.

Tribute *against* Reynolds.

TOurner moved in Arrest of Judgment, R. in consideration T. would Assign certain Closes, promised to pay to M. the Wife of T, &c. and her Administratrix for 3 l. per annum, (whereof the promise was made to be so long as the Defendant should enjoyn the Lands) hath brought against the Executors of R. living T. Action upon the Case, and he conceived the Administratrix of M. a meer Stranger to the promise. 2. There wants profert litteras Administr', which per Curiam is well enough after Verdict. Twisden doubted whether M. might have the Action, because there is no duty owing but only a Collateral Conveyance to be made: Foster & Windham agreed if M. had been a meer stranger the Action would not lye: Contrà here M. being the Wife of the Assignor, and if the Husband sueth he must do it in her Name, or at least may do it so; and this will go to the Administrators of the Wife, who may be other Person then her Husband, for the cause approved by (87) Assumpsit.

the Delegates. Twisden conceived the Husband and Wife cannot bring this Action, because its only for her benefit, and an Annuity for her provision. Adjornatur.

Weden *against* Baldwin. Ante.

Sider f. 55. pl. 23. November 9.

(88) Wards. IN Trespass by Special Verdict it was found, H. was seised to him and his Wife and his Heirs, holden by Knights Service in Capite and in Fée-simple alone of the Lands in question in Soccage, and so seized, devised to his Wife for Life, the Remainder to the Lessor of the Plaintiff, the Heir entred (after the Devisée died) on him, the Tenant for Life being alive: Yet Windham held this Devise good for the whole Soccage Land. 1. At Common Law, if H. seised of Capite Land to himself, Remainder to another and his Heirs, M. 24 Ed. 3. 33. pl. 28. F. Gard. 48. during the life of Tenant for Life there was no wardship, but a kind of Fée did discend to the Heir, but he had no fruit of it, because there was a person able to do Knights Service, but when that impediment is removed he shall be in ward, not only for his Capite, but all other Lands. 2. By the Statute where H. is seised of Lands held in Capite, & of other Lands of a common person, H. may devise two parts; but where he hath Soccage and no Capite, he may devise the whole; and though here he seemeth to have a Fée as well in Capite as Soccage, at least in Reversion or Remainder, yet upon the construction that hath been made on that Statute, this is no such Remainder or Reversion, that shall hinder the devise of the whole, 10 Co. 81. Loveys Case, they being jointly seised to the Heirs of one of them; or when the Remainder is only of a Reversion and in Expectancy, which cannot be held, as where Lands are given for Life, Reversion in Fée, this Reversion granted over is such a Remainder as is meant by the Statute, the consequence hereof falls on the Case at Bar; for by the death of the Husband nothing discends but a bare Remainder, the Wife being in by the first Grant, and the Tenure interrupted by the surviving Tenant for Life, as where Tenant for Life, Remainder for Life, Reversion in Fée to Tenant for life, by the death of Tenant for Life dying, leaveth a bare Remainder to his Issue, and it falls on the reason of Butler and Bakers Case; for when the Capite Tenure determines, the wardship ceases, and so though he have Lands, yet not such as draw wardship, or hinder his devising during the life of Tenant for Life, nor

Moor 177. pl. 313.

nor shall it ever be good after, being void at the time of the death, he having only a Remainder. 3. The Proviso of the Statute that giveth the wardship of the Body in this Case by express words, by consequence whereof it seemeth that the Devise is void; but this Clause is not to be amplified, because it alters the Common Law, which when in affirmative words implyeth a Negative, Amy Townsends Case, as here, that he shall be in ward for his Body shall intend, and not for any thing else but a bare naked wardship, without any benefit of other Lands discended till the death of Tenant for Life. Twisden of the same Opinion, 15 Ed. 4. 11. and Binghams Case, F. N. B. 144. that at Common Law, during the life of Tenant for Life, 25 Ed. 3. 93. 27 Ed. 3. 80. and Bokenhams Case: and so here, when they are Joynt-seised, the Tenant for Life surviving, the Heir shall not be in ward, and the Statute was made for the benefit of the Lords, not of the Heir, 2 Inst. 111. and therefore wheresoever there was no wardship they left him at liberty to Devise as he pleased, as Loveys Case: And if the Body of the Law will not alter this Case, the Proviso, which is an Enacting Clause, shall not be extended, à verbis Legis non est Recedendum, 33 H. 8. 39. All Lands in the Seisin of any person liable to the Kings Debt, shall be charged; yet the Feoffee of the Issue, though he come under the Tenant in Tail, yet because the Lands are not in the Seisin of the Issue, it shall not be liable, because the Issue was not liable at Common Law, 7 Eliz. Court of Wards, Larimors Case, H. seised as in the Case at Bar, the Husband died, his Heir within Age, the Wife surviving, adjudged upon great deliberation with the Judges, That the King shall have no benefit of the Soccage Lands, because the Statute provides only for the wardship of the Body; and though, as Jones objected, this would have advanced the Heir, and so have been for the Kings benefit, yet it went against him, though there was no devise in that Case: Mallet of the same Opinion; but Foster contrà that it is void for a third part; the Case is entred H. 1659. Rot. 478. The Question rests not so much upon the Common Law, as upon the Statute, the whole Law whereof, as well as the Proviso, is enacting and creating the Points that have been moved at common Law. 1. He conceived that the Husband was so seised, that his Heir shall in any real Action say that he was seised in Fee, die quo obiit, as in some Cases cited in Wiscots Case. And 2. by the Statute, which was as well for the Peoples benefit as the Lords, for without this Statute the Subject could not provide for his Children by Devise, but

lest

left the Lord should be prejudiced hereby, there is remedy provided for him, and this Inheritance shall be liable to any charge of the Auncester, and the Heir shall have the Inheritance to all purposes, according to the present Estates of the Husband, especially because non Constat, whether this was made during or before the Coverture; if before, he might plainly dispose of a Moiety presently; and the Judges were divided in Loveys Case; though the solidity of the Case he doubted not: And this Case is not of a bare or dry Reversion, but a working and beneficial one, as Bedingfields Case, and the Heir must claim by a dying seis'd of the Husband: And so Judgment ought to be for the Plaintiff for two parts only, and not Guilty for the Defendant for the third.

Judgment for the Plaintiff for all.

Dr. Withringtons Case.

(89) Mandamus.

SErjeant Keeling conceived none of the Causes are sufficient to justifie the Return, for none of his Pupils complained, 3 Inst. 46. they admonished three times within ten days, which besides the shortness of the time, he conceived cannot be intended (as it must be) for several crimes; and this crime is neither within the greater or lesser causes of their Jurisdiction; and they gave him but three days time for Return, which they judged for the honour and profit of the College. 2. He conceived this Court is a proper place to relieve him, nor need he Appeal. Mag. Charta 29. contains the great remedials of the Subjects Oppression, 11 Co. 98. 4 Inst. 71. the custody whereof this Court hath, and must regulate other Jurisdiction, P. 11 Car. Allen *against* Nash, the last Clause whereof this Case is grounded on and Registr. 69. and is within the same Equity as for Mayors, Sanctuary-men, &c. for he hath a Freehold: But admit they be Spiritual things, yet this Court must Judge of what Causes, as 12 Co. 42. Fullers Case, the Spiritual Courts have Jurisdiction, but Fellowships are purely Civil, and Lay-men capable of them, Registr. 35. and Spiritual persons cannot meddle with them, Registr. 40. b. 41. a. 43. b. A Prohibition lyeth if the Bishop meddles with him; and though it hath been likened to a Deprivation, Kens Case, 7 Co. 44. yet without any Warrant of Law, 9 Ed. 4. 24. that Plea being in Abatement not upon complaint, he agreed that if the Cause appear to be within their Jurisdiction, then Error lieth not of their Deprivation, Huntleys Case was discontinued without any Opinion, 5 Co. 58. And as Refusal, so a Fortiori Deprivation must be specially

cially certified, Regiſtr. 38. and upon general Deprivation without cauſe, he may be remedied by Prohibition: And this care the Law hath to keep them within their due bounds, F. N. B. in a Significavit, 14 H. 4. 14. b. the Biſhop muſt expreſs the particular Cauſe that the Court may Judge whether it be within their Juriſdiction, M. 15. Car. Colts Caſe, Return by Habeas Corpus, that he was committed for not obeying the Judgment of the Court of Requeſts, which was not good without ſhewing the Cauſe, 43 Jac. Ruſſels Caſe. So by the Chancery, and ſo was it in a Return by the Treaſurer, M. 3. Car. Sir Samuel Vaſſals Caſe, and here he conceived the Cauſe inſufficient, and ſo ought to have reſtitution: 3. The complaint is that he is minus juſtè removed from his Freehold; and therefore the having local Viſitors is not ſufficient to foreſtall the Juriſdiction of the Kings Courts. M. 11. Car. Lathans Caſe, upon information brought here was ruled good, as well as it might have been below, becauſe the Statute had no Negative Words; Every Man is Maſter of his own diſpoſition, and may appoint Laws to regulate his gift, but the Law of England ſhall interpret ſuch Laws, and the Viſitor is but a Superiour Intendant over them; but cannot take away the Juriſdiction of this Court, ſo a Will appointing H. to expound a Will yet that ſhall not toll the Judgment of the Court. F.N.B.21. 22. will not alter this Caſe, being Courts Created by the publick Laws of the Nation, but this gives little ſtrength to the private Laws or Cuſtoms, but that they may be leapt over; for as this Caſe is there can be no Appeal, becauſe they proceeded not upon their particular Statutes, but upon matter out of their Juriſdiction, Appeals in Civil being the ſame as Errors by Common Law, neither will lye unleſs as the Marſhalſea Caſe, the Court have Juriſdiction; Nor is this Caſe of the whole Juriſdiction of the Univerſity, but of private Colleges, who if they expel according to their Statutes are in no Danger. Finch for the College, the Founder might have appointed that the Cenſure of the Maſter ſhould be final without Appeal, and it had been good, and here in effect it is the ſame, and therefore they cannot come hither per ſaltum: Kens Caſe is affirmed in Bags Caſe, and where the Caſes are not expreſſed to be finally determined, Hub. 14. 15. they are reſervate, and pertain to the Ordinary of the place, and thoſe Laws are confirmed by Act of Parliament: Maynard to the ſame intent (being no Argument upon Demurrer) Corporations, as Mayors, &c. have no Viſitors but this Court, the King having given them their being of ſome Corporations, as Abbies and Eccleſiaſticks, which the Law alſo taketh notice

that

that they are, and their Relation is mixed, and in Huntleyes Case the Court ruled, they had no Conusans of the Cause, and therefore general Deprivations was ruled sufficient; some Corporations are meerly Eleemosynary which are given for the Education of Youth, and might have been for years, and have their Rules of internal Government from their Founders, and he having appointed Visitors, their Judgments are Final to the party, Gayer *against* Fairchild, 3 Jac. H. makes a Donation, the Patron may visit by Commission, and the party cannot here be restored, and yet whether he is Visitor or no may be here questioned, Error of a Judgment of C. B. in Parliament abated, because B.R. is betwixt; and so here, at least they must come hither at the darrein resort. Wild to the same effect, that these Fellows are established by Act of Parliament under these manner of By-laws, and therefore they cannot deviate; but he questioned not, but at the darrein resort this Court may take Conusance, though not by Appeal, yet as by way of Inhibition, 24 Car. Habeas Corpus to remove a Prisoner out of the Admiralty, who being in Prison by Sentence, this Court would not examine the cause: And Jones *against* Williams's Case, Error in the Marches of a Judgment in Wales: And upon a Scire Facias, the Seal of Marches being taken away, wherefore a Scire Facias was brought here, removing the Cause, and the Court overruled that it was naught, he being Counsel for the Plaintiff: Also if he hath a Freehold, he may have his Assise.

Allen for Dr. W. The Act of Parliament makes nothing to this Case, because that only confirms it as established, which being without negative words do not conclude; and they have no other power then the King may grant, having but the Effect of a Charter: And so, should a Corporation have a Law thus confirmed, that they may put out any man without cause, this would be void, Windham. Alden *against* Tottils Case. Twelve men Incorporated for maintaining of poor Hospitals is intended Spiritual till the contrary appears, yet whatever the end be, if it be visited by the Patron, its Lay, 8 Ass. 29. Br. 137. the end being Spiritual, thoughthey were all Lay, were capable of an Appropriation, which a Lay Corporation is not; and Colleges are a mixt Corporation, and he knew not upon what ground Keeling denyed (Kens Case 8. Assize 29. 31. Ed. 3.) warranting it, 13 Assize 2. and if a Jury in Assize had found that he was turned out by the Visitors, this Court will not remedy him, but if they have no Jurisdiction of the Cause, one may have a Prohibition. Assise, F. 150. Twisden agreed, Fairchilds Case, and that right or wrong

Colleges are called *Liberæ Capellæ*, because not subject to the Ordinary. Whitlocks Reading, Divis. 3. point 1. f. 36.

wrong upon a Deprivation, no appeal lyeth from the Ordinary, who is fidei Commissarius (Windham) said that Rolls and Glyn were of the same Opinion, as here that Restitution could not be granted, though then there were no Visitors the Court agree Kens Case and Huntlye's to be Law. Adjornatur

Upon a Writ of Error here of a Judgment in the C. B. if continued above a year, yet Judgment being at length given, Execution may be taken out without a new Scire Facias. (90) Execution. 3 Cr. 416. pl. 10. 2 Cr. 364. pl. 3. Godbolt. 372. pl. 461.

Bushel *against* Jay.

ALlen moved for prohibition to the Admiralty upon a Charter-party, the Plaintiff declared in an Action upon the Case, upon a promise made on the high Sea upon an agreement according to, but not mentioning the Charter-party which was only by Suggestion, but the same with the Charter-party, which really was made upon the Land, and the Court granted it. Nisi. (91) Prohibition.

Robinson *against* Coxe and Warwick. Ante.

Mich. 40 & 41 Eliz.

ARds *against* Walker is a Case in the very point that the Action of Debt lyeth; Judgment staid till the same point be decided in the Exchequer Chamber, wherein the Court was here before divided. (92) In Debt. Br. 94. Sen. 93.

The King *against* Colebanke.

INdictment of Trespass for counselling a Servant to cheat his Master, which being not Felony, &c. ought to have joyned the Servant in an Action, all being Principals; but per Curiam, all may be Indicted joyntly or severally at Election, but here it appears the Acts were several which the Court doubted. 2. It was to the House of a feme Covert did carry, which was well enough. 3. It was that she converted the Wine, cheated and delivered to her to her own use, which per Twisden is not to purpose but. Adjornatur. (93) Tresp. Sess.

Wheeler *against* Honour. Siderf. 58. pl. 26.

November 11.

(94) Fines.

IN Evidence to a Jury upon the Question of Fines of Copyholds, it was agreed that the party was admitted, which is the entitling of the Lord to it; and it was agreed, That all Fines are reasonable, unless the contrary appear it was 40 l. which by Sir Jeoffry Palmer needed not be demanded, 2 Cr. Gardner *against* Norman, Hub. Denny *against* Leman, but notice must be given thereof, and the time and place of payment ascertain'd, and a Refusal must be proved, which the Court agreed; but doubted whether without a Demand it should be a Forfeiture. And by Glyn for the Defendant, That it being a Forfeit, it shall be taken strictly; if the Fine were certain, no notice is necessary, contrà where incertain. And by Maynard for the Defendant, where the certainty is dubious, the Refusal is no Forfeiture, which all agreed, but Willis's Case, C. B. cited by Foster contrà Parker *against* Corke, B.R. that H. would appear if it were a Court, if none, he would not, and adjudged no Forfeiture. And by Windham, when such doubt is covenously made, the Tenant shall have no benefit of it, as was ruled at the Trial in Corks Case in the West.

Henning *against* Braberson.

In C. B. in Ejectment.

(95) Future interest may be granted over by Lessee, notwithstanding Disseisin of Lessor or Tenant for Life. 2 Brownl. 226. pl. 177. 2 Leonard 99. pl. 121.

TWo Joyntenants being disseised, one may enter and its good to both by Bridgman Chief Justice, who conceived the Estate of the Lessee never turned to a right, yet had it by the Entry of one of the Joyntenant Lessors, he doth remove the Impediment, 9 Co. 106. M. Podgers Case is stronger than this Case, and none but the Lessor can enter, for the Lessees were the Disseisées: and had they been disseised, yet such disseisor had been liable to the Disseisées charge; and though there were no right to the Possession, yet its necessary that the Lessor entet to purge the Disseisin, which was lawful for him to do; and so makes it as if their had been no Disseisin in the Case, without question the Lessor may Expulse the Lessée, yet Elvies Case, Hub. 322. doth not thereby gain a Fée, nor may be said properly to disseise any, 1 Inst. 249. the same Case cited to be contrary adjudged to Elves's Case: And so 12 Car.

1 Brant. 25. pl. 76.

C.B.

C. B. Sir Anth. Aucher's Caſe. H. granted Advowſon for years in futuro, during which the Reverſioner uſurps it, doth not take away the Leaſe; for by the Uſurpation or Entry of the Leſſor the Term was never turned to a right, the Aſſignment being made off of the Land by a Termor is good to an under Tenant, and ſo concluded for the Plaintiff, as the reſt had agréed before: The Caſe being, A. and H. ſeiſed, let to the Leſſor of the Plaintiff for 81. years, to begin at Michaelmas next, if the Leſſor of the Plaintiff lived ſo long, Habendum for 31. years after his death, Leſſée enters before Michaelmas, after H. Leſſor enters upon the Leſſée, and then the Leſſée aſſigns to the Plaintiff being out of Poſſeſſion.

That ſuch Entry is no Diſſeiſin, nor hinders Commencement of the Leaſe. So to ſay *H.* entred *virtute dimiſſionis* is alſo good without the day: Only its no Diſſeiſin to enter after any Communication, if the Leaſe after made relate to it.

Brice *againſt* Curr.

Trin. 12 Car. 2. Rot. 1238.

(96) Covenant, Hitch. 23. pl. 63 Seiles 31. pl. 75. 3 Leonard 119. Godbolt 217. pl. 312. *H.* may have Debt or Covenant at Election on Covenant to pay Money. So 42 Ed. 3. 9. pl. 7. When Covenant is to pay Money, its a ſingle Bill, but if it be to pay Money on the delivery of any thing, an Accord is a good Plea, Mich. in Baker *a gainſt* Llenial, this is the proper Remedy, for Accompt lieth only againſt the Receiver, 5 Ed. 3. 14. b. pl. 8. An Obligation given for Money ſtated on Accompt before Auditors doth extinct it; *contrà* of a Parol to pay ſuch money, 29 Ed. 3. 25. b. pl.

ACtion of Covenant, the Plaintiff declares upon a writing of the Defendants Teſtator, acknowledging himſelf to be accomptable to the Plaintiff for whatever Money the Plaintiff ſhould charge upon J. S. payable to Sir T. V. And by Bernard in Arreſt of Judgment an Action of Accompt properly lyeth, and not Covenant for Money ſo delivered: But per Curiam there is no other remedy againſt Executors; and had it been againſt the party himſelf, ſuch Agréement being by one perſon to pay Money charged upon J. S. for which an Accompt lieth not, he being not chargeable as Receiver or Baily, the only remedy is by Covenant: And its not like Geens and Reſons Caſe, 1 Cr. 128. 2. No notice is given by the Plaintiff to Dixon, who upon ſuch Bills was to pay to Sir T. Viner, which per Curiam is not neceſſary.

Judgment for the Plaintiff.

De la Bar *againſt* Yarnly. Ante. Error Br. 90.

November 12.

(97) Amendment.

1. Cr. SMith and Sherley *againſt* Underhill, Hut. 41. & 15 Car. Belch *againſt* Page in Ejectment, Judgment quod recuperet, & ſaid not terminum, yet amended. And by Twiſden the Judgment in Quare Impedit was guided by the Covenant de Eccleſia, and not Vicaria: And the other

of Smith was in C.B. who have a Docket Book in the hands of each Prothonotary, whereby they correct their Judgments: But this Court hath no inducement to be amended for the Plaintiff, and his Pledges are liable the one in default of the other: But Beechers Case is that the Pledges are only averrible upon a Nonsuit. But whether this be Surplus or no, Adjornatur to search Presidents.

The King *against* Baily. Ante.

(98) Bayl. THe Return being filed, the Court refused till the Cause tryed to Bail him, because at least it is Manslaughter of a high Nature.

Evesque Landaff *against* Lewis.

(99) Quare impedit. UPon Error here of a Quare Impedit in Wales per Curiam, according to course if the Certiorari be here entred, the Defendant must have a Scire Facias ad assignand. Errores if not entred first, and after Quare executionem non haberet by Writ to the Bishop.

(100) Dower. IF the party appeared in Dower, and Judgment upon Tryal be had, Error cannot be assigned in default of a mean Summons by the Common Law, per Windham & Curiam. 2. The Writ of Certiorari is to remove a Record by our Writ, whereas the Record was by a Writ of Oliver Protector, the Error was assigned that there was no Original Writ, and the Writ was ill being by O. P. which was in the Certiorari, Recited by our Writ in Error brought in the time of the Keepers, and so no Warrant to remove such Record, being after Diminution alledged, and plea as aforesaid, but the Court after Verdict will presume there was another good Writ. Judgment affirmed, nisi.

Cudmore *against* Lewis. In Assets per Br. 15.

(101) Judgment. Stiles 287. pl. 629. 2 Cr. 85. pl. 10. 1 Brownl. 54. pl. 1 Cr. 437. pl. 513. The Heir shall not be fined for denying his

ERror to Reverse a Judgment in C.B. upon Demurrer upon a Replication: Allen conceived that the Judgment should be against the Heir, generally because he pleaded that his Father devised for payment of Portions beside the Reversion, whereof he hath nothing. Plaintiff Replyed that the Lands are holden in Capite, and so as to a third part are not charged by the Will, upon which the Defendant demurred, and having set out his Estate the Plaintiff shall not have any advantage by General Judgment, Davis *against* Peeps, the difference is where such

such setting forth is true and where not, and here the Heir sheweth only a Reversion chargeable, the Plaintiff hath shewn a possession, and per Twisden, it is in the Election of the Plaintiff to have Judgment specially of the Land as set forth, but he may also have it generally. 2. It is said the Manner was holden in chief by the Twentieth part of a Knights Fee, and doth not say de facto, that it was holden of the King by Knights Service in Capite, all which was assigned special for Error, sed non Allocatur.

Judgment affirmed.

Auncesters deed *Mordancestr.* 65. *ou Riens per discent* pleaded if any Assets be found the Heir shall be charged for the whole, 18 Ed. 3. 51. 6. pl. 59. *per Grene.* as well in *Formedon* as in Debt on Obligation, although Lands discended after the Death of the Ancestor, 21. Ed. 3. 9. b. pl. 28. all that he hath *die brevis* shall be charged, 1 Inst. 102. Com. 440.

So on *Nihil dicit* it shall be general with Execution on his own goods, 3 Cr. 263. pl. 1. Tenant in Assize was taken for pleading false Deed of the Auncester, Imprisonmet, Br. 61. yet it is said *contrà* in pl. 62. Ibidem.

Weller *against* Prideux in Debt. Br. 22.

(102)

ACtion of Trespass upon Assault, the Defendant pleaded the Statute of Limitations: The Plaintiff saith, That Oliver and certain Rebels had usurped, and the Kings Courts were shut, so that he could not prosecute by Writ: The Defendant rejoyned by the Act of Judicial Procedings and Oblivion; whereupon the Plaintiff demurred. And 1. It was a Suit by Bill, which by Wild for the Defendant is not helped by such Plea. 2. If the Courts had bin shut up for five years, this Court could not help it, especially being by Statute to be brought within a certain time: And the Act of Oblivion hath established all things, as if the King to those purposes had been present.

Judgment pro Defendente per Curiam, Nisi.

Limitations. Pl Com. 9. b. Owen 57. Bract. 240. b. The King by Proclamation may prohibit all Suits for Rent incurred *tempore Belli*, 9 Ed. 3. 16. pl. 29. but Debt lieth notwithstanding Invasion. Stiles 47. Resc. Br. 27. Dy. 241. pl. 47. b appears *Fayler*

To say the Courts were shut is a good Excuse on Voucher of Record in B. R. or C. B. as *de Rec'*. Br. 5. Ass. Br. 201. of 15 Ass. 16.

Lawson *against* Crofts. Ante.

(103)

DEbt against Defendant as Administrator durante minore ætate, who said that such a day the Infant attained Age of 17. and that after he did not administer, which by Allen for the Plaintiff upon Demurrer is not good; for if he did administer the day that the Infant came of age, he shall be charged: But by Twisden, whether as Executor of his own wrong, Chandler and Tomsons Case, Hub. or as Administrator during minore ætate, as Sheriff after delivery of Prisoners, so is Knivets Case, C. B. 2 Car. but another Opinion

Debt. Moor 462. Godbolt 104. 1 Brownl. 80. pl. 395.

nion hath been as in Bagnals Case, and Palmer and Livertons Case, B. R. 2 Car. that he shall be charged especially: But all agréed that he must plead Fully administred; and by him this Plea should have béen pleaded in Abatement, not after Imparlance. And Windham conceived that the fittest way to charge him is as Administrator durante minore ætate continuing. Judgment for the Plaintiff.

Lord of Suffolk *against* Bettison.

(104) 14 Ed. 4. IN Debt upon Bond in nature of a Statute Staple defeasant, to pay Money upon a Purchase; The Defendant pleaded performance of all Covenants generally, which per Curiam upon Demurrer by the Plaintiff upon the Plea, is naught, Special things being to be done, it must be shewed specially how performed.

In Det. Br. 29. Cook *against* Newman.

(105) 2 Leond. 214. pl. Hitch. 2. b. pl. 13. 2 Cr. 483. pl. 19. c. Goldsb. 81. pl. 21. c. IN Action upon the Case upon promise to deliver Books within a fortnight, the Defendant plead that within the time the Plaintiff gave him Order Parol to deliver no more till request, which per Curiam upon Demurrer is sufficient. 2. After this the Plaintiff prayed to discontinue because the Plea was false, which was granted.

(106) Return. SHeriff upon a Scire Facias Returned that none came to shew the Goods, which Winnington prayed might be amended, because unless it appear where the Goods were it is not good, but the Court gave only time to make it as the Sheriff would stand to it, and if false, that the party in forma pauperis be left to his remedy.

Smithson *against* Pain.

(107) Prohibition. SErjeant Keeling. on 1 Cr. 97. & 296. said a Prohibition shall not go after Sentence, in an Action upon a Charter-party which although it be not for the penalty, this Court would not stay because that Court hath no Jurisdiction, as is conceived in that Apocripha, in 1 Cr. 296. and nothing more ordinary then to prohibit after Sentence or Appeal, yet not without very good Cause, & 1 Cr. 96. they had Jurisdiction of the Cause, and therefore being only Erroneous, the Court will not grant it after Sentence,

Jones

Jones for the Plaintiff said that by the Act of Judicial proceedings, that Court (which then had Jurisdiction) is confirmed wherefore the Rule for a Prohibition was discharged.

Wallis *against* Ust.

(108) Slander.

Of H. Wife of J. S. that she is thy Whore, I say H. is thy Whore, and I will maintain it; the Declaration and Verdict being in Tr. 61. and confirmed by that Act of Judicial proceedings after the Declaration, and before the Verdict amended, & Wallup for the Plaintiff prayed Judgment, the words being then by an Act Actionable, (and all proceedings) being confirmed, the Court inclined for the Plaintiff, as per Windham had been Ruled in his Circuit, but Foster absent, and Twisden doubting whether any thing not executed be confirmed. Adjornatur.

Skipton *against* Cole.

(109) Error.

Error of a Judgment in an Inferiour Court in an Action upon the Case for promise, 1. A Capias issued out where as Summons should have been first, sed non allocatur, the party having appeared. 2. The agreement was for Tymber Frame (and said not where to Entitle them to Jurisdiction) and also to plow Land, &c. Thirdly, 24. were returned, and tryed the Cause, which the Court conceived a gross Error.

against Welden.

November 13.

(110) Continuance.

Allen for the Defendant. If a new Fieri Facias be taken out, every year one, Continuances may be entred at any time by the Attorney in his Chamber, otherwise not, which the Court agréed; and that Continuances upon Latitat is sufficient without renewal. And by Wild for the Plaintiff, If there be a Testatum Scire Facias served by the Sheriff, Continuances may be entred without renewal, Sir John Lenthall and Smithby, B. R. the difference is betwixt a Suit and Execution; but per Curiam that was upon a Cap. taken out of Term; but by Wild & Curiam an Elegit taken out once, may be continued Seven years, which the Court agréed: And by Foster, unless Presidents before 1640. be so, its not allowable; contrà by Twisden, and that they that sate here since, knew and observed Process as well as their Predecessors; but

but all the Clerks agréed the Course to be as Wild alledged; and by the Course of the C. B. Continuances may be entred before the Return. Adjornatur.

Foster *against* Foster.

Trin. 1659. Rot. 751.

(111) 1 Brant. 260. pl.623. 1 Brownl. 141. pl.503.

IN Ejectment by Special Verdict, it appeared Margaret F. was seised, and did bargain and sell in hæc verba, Articles of Covenant concluded and agreed upon by M. F. of one part, and Matth. F. her Son on the other, for divers causes and considerations, and especially of 20 pounds payable to the Assigns of M. F. after her death, granted, bargained, and sold to the Son and his Heirs, and that she should quietly enjoy during her Life, and that she should have a Ferm of Matthew the Son for her Life; and after M. F. did grant, bargain, and sell to N. F. another Son and his Heirs, for Affection and Covenant to stand seised accordingly, but there wants Livery; and therefore by Tourner for the Plaintiff, on Colthirsts Case, Pl.Com. 25. the first Conveyance is not good, being not inrolled according to 27 H. 8. 16. rising neither by Transmutation of Possession, 1 Inst. 271. nor by way of Covenant to stand seised, Winch. 59. M. 6 Jac. C.B. Rot. 2120. Buckley *against* Symons in Quare Impedit, these Points were resolved, That to raise a Use there must be 1. a Consideration sufficient of Blood, Money, &c. 2. A Déed to testifie this Covenant, as Callerds Case 38 Eliz. 3. A Seisin of the Land. 4. A Limitation suitable to the Rules of Law, the first and last whereof are here wanting, 7 Co. Bedels Case, & 4 Co. 4. b. Nokes's Case, the Consideration implyed ceasing by that express, 9 Ed. 4. 28. b. 5 Co. 97. b. Goodales Case, 11 Co. 24. and when Money is expressed, the Déed must be enrolled. And 2. the Juries finding that this Déed was as well in consideration of Affection as Money, Dyer 147. is not material, being not averrable, as 2 Co. 4. b. nor can 29 Ass. 42. the Jury be charged therewith, Dyer 140. especially the Déed being found in hæc verba, against which they cannot find, expressum facit cessare tacitum, Entry F. 78. F. N. B. 205. and yet there may be one Consideration expressed, 1 Co. 76. and another implyed, but not to the same person, Dyer 146. Beaumont *against* Villers, the Objection, That construction may be made ut res magis valeat must be limited by the Rules of Law, 8 Co. 94. and the intent of the parties, which was to pass it by Bargain and Sale, and not by Covenant to stand seised. But admitting the

the Consideration good and averrable, yet the Limitation is against the Rules of Law, being to pass a Freehold in futuro, Baker and Symons Case, 1 Cr. 138. after the death of M. F. by agreement of the parties, Tr. 15 Car. B. R. Price *against* Pitfield, the Father in consideration of Marriage of his second Son, did covenant and grant his Land after his death, no Livery being made, it was adjudged void, Dyer 55. and so prayed Judgment for the Plaintiff. Allen for the Defendant, Supposing the 20 l. had not been mentioned, yet a Use would have risen upon this Deed, an Use at Common Law being but an equitable Right, and whatsoever Contract did give such Right might raise an Use; and the Statute alters not the manner of raising the Uses, Dyer 229. but only executes the Possession to the Use, and so agreed, Collard *against* Collard, Popham 47. & Dyer 296. seeming to the contrary that a Use would not rise by parol. Mich. 10. 11 Eliz. Rot. 2200. is misreported, for it was only a promise that he would assure in futuro, and not that a Use could not be raised by parol. 2. Such Consideration as will now raise a Use might do so at Common Law, and è contrà, 1. Negatively, where it doth appear by the Deed it self that the Estate is to be conveyed, by Common Law no Use will rise, Foxes Case; Tr. 37 Eliz. Rot. 149. B. R. Teb *against* Pottlewell. A Deed made by a Feme causa Matrimonii prælocuti dedi concessi to one whom she intended to marry, and no Livery being, no Use would arise by Popham, contrà by Clench and Fenner, although there was a Warranty against her, and her Heirs: But Popham agreed that an Averment might be in such Case, and upon Grant that J.S. shall have my Land after my death, an Use did rise by him, but no Judgment was entred in the Case. And in Dyer 302. the Deed had the form of a Release without consideration: And Plowden conceived that an Averment would lye; but Dyer conceived the contrary: But the elder Brother did Release. But by Twisden the Land was enjoyed against Plowdens conceit to this day: But by Allen that was only intended a Conveyance at Common Law as a Release. 2. When there is an Agreement for further Assurance, Dyer 162. no Use will rise till Execution of such future Conveyance, though a Recovery be had in order thereto, Dyer 96. 235. but where there is a present Execution it rises. 3. When the Deed is not immediately declaratory, 21 H. 7. 18. and where immediately to extinct the Possession, Dyer 55. goeth upon the same reason; so 1 Co. 129. & Seignior Pagets Case, & Rector of Cheddingtons Case; and the Case of Buckley *against* Symons was upon the same difference, the Tenure of the Deed being

Moor 554. pl. 722.

3 Cr. 344. pl. 16.

1 Brant. 335. pl. 817.

14 H. 8. 18. b. pl. 6. per Porte.

only Covenants de futuro, and the Lands upon granting several Rents was to remain and be within words obligatory, which raise no Uses, and not declaratory as here all is done and executed immediately. 2. Positively, where the Covenants are immediate, and present, a Use will arise, though the Conveyance be in form of Common Law by grant, &c. for the word Covenant is not necessary, so there be a good consideration, for the Covenant in this Case hath not properly the effect of a Covenant, but is only a Writing declaring the Use; and Callerds Case was not reverst, because the words were only Dedi, &c. but because there wanted a Deed to manifest it. In C. B. Tr. 1649. Rot. 1549. Wats *against* Dawson: As to this point, Watson being seised in consideration of affection to his Neece, and of several Sums of Money, the Court conceived it good by way of Bargain and Sale, yet if not, it had been a good Covenant to stand seised, so H 1655. Rot. 1578. Sanders *against* Savell, C. B. Sympson *against* Keitle, M. 1657. C. B. Rot. 2421. H. 1656. C. B. Peer *against* ..... H. in consideration of Marriage had absolutely given and granted to his Son, without Livery found (although it were endorsed) yet it was adjudged that a Use did rise, and there is no Case against this, but 2 Cr. 127. an Opinion in Osborns Case in Evidence, the Case of Pitfield *against* Price entred H. 11. Car. Rot. 439. upon a Special Verdict, the Jury found a Deed made upon an express consideration, and of affection, but found not the Deed in hæc verba; yet the Deed was, I give, grant, &c. to J. my Son, and the Heirs general of his Body after my death, which is adjudged against the Daughter, Issue of J. which could not otherwise be; for had it been by Use to the Father for Life, Remainder to the Son in Tail, the Father entring and making a Feoffment with warranty, that discending upon her, she is bound: But by Foster Counsel in that Case, this point was not started; but yet this is but an intent future that J. should have it after my death, Habendum to him and his Heirs, so that the Father kept a Fee in himself; the Deed in the Case at Bar is well executed, being I grant all my Lands to my Son, I enjoying it during my Life, the Use well rises, and the Fee is out of J. presently, as if it had been Reserving to J. for Life; and this Case is not capable of any further Execution by Livery or otherwise, it carrying an allotment of Dower within it; and therefore the Construction, although dubious, shall be taken for the better. 2. Point, That the expression of the Consideration doth not make the Deed void for want of Enrollment, because this Deed is not to execute an Estate by Bargain and Sale

1 Brant. 36. pl. 105.

Sale only, Manxels Case 4. Feoffment to use, Br. 26. and had the Considerations been both expressed, there had been no question, and although one be expressed, yet Mildmays Case, if it be not upon a plain Bargain, another implyed may be averred; as a Consideration of affection being Enrolled, may be averred for Money: And Beedles Case is rather taken off then agreed in Harpers Case, 11 Co. 24. the Court shall not presume any other, but yet another consistent with that expresst may be averred; and Dyer 146. cannot be differenced by being to a third person, for both must be Enrolled: But he relyed, That here the Deed being for divers Causes, 2 Co. 15. and especially for 20 l. there needs no averment, especially the party being a Son, which implyes of it self a Consideration. Post. Entred Tr. 59. Rot. 751.

Adjornatur.

Travis *against* Meers. Ante.

TO make appear is no consideration, being no more then that, if H. oweth I will pay, which is not sufficient unless it be precedent to the Action, brought or grounded upon a precedent consideration, which Windham denyed; and that it is better that the consideration be future, which will not be like if I owe I will pay, which is no consideration; but to make appear is trouble, and therefore is intituled to an Action before, yet the consideration here riseth with the promise, and it directs to an Action wherein he can have no other advantage but must make appear, which the Court agreed and if there be no precedent consideration, he cannot make it appear, 18 Jac. Grinvil in consideration A. will prove B. beat his Son, &c. this was good, and may be by the same Action. (112) In Cond. Br. 151.

Dawson *against* Dunre. Ante.

KEeling the Kings Serjeant moved for Judgment, the Information being plain enough, that Dat Curiæ intelligi, quod recordatur in hæc verba, and then proceeds to the matter of fact, & quod Juratores, and so to the Tryal, &c. and although this seems wholly to refer to the Recordatur & ulterius Dat Curiæ intelligi had been better, yet here the Court will take notice this cannot be recorded, what Men do at the Assises, and now the best shall be intended, per Curiam. Twisden excepted that it is alledged that the false Oath was in a writing, portending a Letter of Attorney, and the Perjury is alledged in the Letter of Attorney, but Curia Contrà. (113) Information.

Rippon *against* Rutler.

(114) Trover. THe Teſtator poſſeſt of a Bond declared in a Common Trover, the Defendant pleaded a delivery by Duces by the Plaintiff in Special Verdict, it was agreed that it lay of a Bond. 2. Upon delivery no Converſion can be without demand: And here the Jury having found a Converſion.

Judgment for the Plaintiff, Niſi.

Collins *against* Walker. Ante.

(115) In *de ſon tort* Br. 12. The ſame difference agreed 18.Ed.3.10.b. pl.39. 2 Leonard. 102.pl.127. 22 Car. OSborn *against* Broke, That Replication to Juſtification by a Warrant to arreſt de injuria ſua propria ſans tiel Cauſe, is but Jeofaile. By Wild for the Plaintiff, its good after Verdict, as here Mallet diſtinguiſheth betwixt Peter *against* Staffords Caſe; and this becauſe this is a Travers of the whole; contrà where he had traverſt the Matter of Fact: But per Curiam Iſſue being upon Affirmative, its but a Jeofaile. And Judgment for the Plaintiff.

Sikes *against* Cooke.

(116) Ejectment. BUrrel ſhewed Cauſe in Ejectment againſt Judgment being affirmed in Error of an Entry & Ouſter without Vi & Armis, in the Plaint, which per Curiam is not helped by Verdict for the Plaintiff, but is a manifeſt Error, which the Court would not ſuffer to be amended in the C.B. now, unleſs it had been before; but if upon Diminution it be certified well, the Court here will amend it.

(117) Error. IF Error be brought, Term. Mich. there is all that Term to return the Record, and if then none be certified, the Clerks below per Curiam (it being only for delay) may after the Term award Execution.

Capenhurſt *against* Capenhurſt. Ante.

(118) 1 Brant. 339.b. pl.48. 3 Cr.362.pl. 24. JOnes moved for Judgment, & agréed the Aſſignment of the Leaſe void, as Rector of Chedingtons Caſe; but yet the Covenant that refers thereto ſhall ſtand by it ſelf, unleſs it be ſuch Covenants as depend on the Eſtate, and go with the Reverſion, as to build a Houſe; but contrà of collateral Covenants, as that the Leſſor is ſeiſed of a good Eſtate. So P. 10 Jac. Walter *against* Dean and Chapter of Norwich, the Defendant leaſed to T. and after to another for 40 years, with

with Covenant in the laſt for quiet Enjoyment, which was reſolved with this very difference. 2. Here is but one Covenant in the Indenture, and ſo if it be void, the Bond is ſingle. Bigland for the Defendant. The Court now waived that the Bond was ſingle, and inſiſted on the Covenant which here relates to a precedent Grant. A Bond for performance of an Award, if it be void, the Plaintiff ſhall never have Judgment on the Bond, Vallet *againſt* Fletcher, Yelvert. becauſe it was not for Money, but originally to perform a collateral thing, Windham in the Caſe of the Dean and Chapter of Norwich, Covenant lyeth, becauſe no other remedy, though the party cannot have the whole Effect of his Suit; but here the intent is that the Covenant ſhall go with the Leaſe, which if void, that falls: And Twiſden conceives no difference betwixt this and Suffran & Scurro in Yelvert. The Covenant was of Omnia ſuperius conceſſa in forma prædicta. Foſter cited Leaſe of Tenant for Life for 21. years, with Covenant to enjoy during the Term, and Bond accordingly, by his death the Bond falls, and the Court granted a Nil Capiat per Billam, Niſi. Poſt.

Buſhel *againſt* Jay. Ante.

POwis ſhewed cauſe againſt a Prohibition, That it was ſuggeſted on the high Sea by agreement; which yet the Court would not regard: that Suggeſtion, for the Prohibition being that the Agreement was grounded on a Charter-party made on Land. (119) Prohibition.

Siderf. 64. Barrow *againſt* Hewit. Ante. Errror Br. 13.

THe Mittimus to remove a Record out of Cheſter was directed Juſticiario of Cheſter, who Returns a Record before the Ch. Juſtice, which by Buck is well enough, Hub. 138. 34 & 35 H. 8. cap. 26. §. 6. becauſe but one Juſtice there, 1 Cr. 189. Had the Writ been to J. Bradſhaw, it had been well enough, and the word Juſtice but Surpluſage: And ſo prayed Judgment for the Plaintiff in the Writ of Error. Poſt, Adjornatur. (120) Variance. The general directions are *Juſticiario*. Co. Entr. 225. b. §. 1.

Twiſden

Siderf. 58. pl. 26. Wheeler *against* Honour. Ante.

(121) Tryals. TWisden said he never remembred but two new Trials at Bar, one a Welsh Case upon a Robbery, and Wood & Gulstons Case upon 1500 l. Damages given for words: And although this Verdict were against the Opinion of the Court, yet being in Ejectment, and the matter barely of Fact, and in their Conusance, per Curiam no new Trial can be: But by Twisden, the Lord may bring Debt for his Fine, Allen *against* .... and so is not without all remedy, which Windham agréed: And Trials at the Bar are to the end to have the most discréet persons; and therefore to clap on ordinary persons upon a Tales in such Case was not fitting, yet without a practice in the party himself, no new Trial may be, but only the Sheriff punishable.

2 Leonard 179. pl. 219.

King *against* Alsop.

(122) Assumpsit. A Special Action upon the Case upon differences about an Indictment of Perjury, and for Dyet: The Defendant promised that if T. did not prove that J. S. who prosecuted the Plaintiff in a certain sum was perjured, that (then if the Plaintiff would Release to Taylor) if he did not prove the said J. S. in any Action brought by the Plaintiff against him, was promoting of the said Perjury, then he would pay 400 l. But there being no certain Issue, nor Court where, and the Court conceiving the Matter ill, being that one Conspirator should pay 400 l. or prove it against the other. Post.

Adjornatur.

Bens *against* King. Ante.

(123) Arbitrement. 3 Cr. 291. pl. 1. DEbt upon a Bond for performance of an award, which per Jones, who demurr'd for the Defendant, is void, because it is not final but contingent and conditional, if one party be not discharged by the Act of Oblivion, 13 Car. 2. he was to pay. 2. The Plaintiff upon the day of payment was to make a general Release, which is a discharge of the Bond it self; but by Finch for the Plaintiff, The Money being payable at certain days, H. 34 Eliz. (Popham) Sherly *against* Richardson, and therefore the proviso is void, Hub. Worly *against* Beck, but the award good: To the 2. that it is Mutual, and the Submission Bond not Released being July 30. the award Septemb. 1. payable at first feast after, and on Febr. 10. following

1 Brint. 198. pl. 438.

ing: the Releases not to be given till after the last day of payment. Allen for the Defendant that the Award appearing that it is wholly to be performed before Releases are to be, is good but this is not so, for Releases were to be made February 10. whether payment were made or no. 2. Capel *against* Allen this is not a Proviso, but the Body of the Award it self, which is to Release upon payment which per Curiam is void, as if it had been to pay if it be not pardoned, Winch *against* Sanders, 2 Cr. 584. and by Twisden according to Hutton, a Release to the time of the Arbitrement is good if nothing appear contrary Finch. perceiving the Opinion of the Court against him, prayed to discontinue, but the Court conceived it fruitless being in Debt upon a Bond. Judgment for the Defendant.

Boilston *against* Ratliff.

R. in debt to S. & B. Joyntly. S becometh a Bankrupt, and the Commissioners assign this Obligation to B. Finch for the Plaintiff relyed upon the Book of 22. H. 6. 47. that an Attachment of such a Debt by the Custom of London was good, but per Twisden that Case fell off upon the pleading, but that being forfeitable by one and grantable by one to the King, the Assignees of the Commissioners must have the same remedy that the Bankrupt had, and therefore this or none: But per Curiam, this is a Penal Law and to be taken more strictly as to other persons, then to the Bankrupt himself: And by Windham the Kings Tenant in Common shall present every Tourn, Contrà of a common Person as Assignee of Commissioners of it, for the Bankrupsie of the Patentee; & per Twisden one may have Debt by special Act of Parliament upon a joynt Obligation. Adjornatur. (124) Bankrupt. Godbolt. 195. pl. 282. Noy. 442.

Hall *against* Pavie. Ante.

THe Indentures were betwixt L. and J. Pavie and Joseph Hall without shewing betwixt who of one part or the other in the Condition of the Obligation, and the Plea was that the Indenture was made betwixt Hall and Leonard Pavie, and so a Variance, by Jones for the Plaintiff, in Demurrer upon the Plea; but by Windham it is the truth, although not the whole truth; but the Court conceived it a Variance. Entr. in le Per, Br. 4. Judgment for the Plaintiff, Nisi. (125) *ante* 117. Variance. In Bar' Fitz. 9. 1 Brant. 205. pl. 477. H. pleaded that A. bargained and sold by Indenture made between A, B, and C. and H. good.

So *Certiorari* of a Record recovered *coram* J. S. *et Socio* is good for *Sociis*. And in Count on Lease by A. its sufficient; If A. and B. did Lease, if A. survived, 6 Ed. 3. 4. b. pl. 12. but in waste against *Baron et Feme* as Lessees, is not good against him, being sole Lessee. 6 Ed. 3. 9. pl. 24.

In

In Writ of Entry ſuppoſed by one, H. may ſay he entred by two, but not *è contra*; if it ſuppoſe by two, H. cannot ſay he entred only by one, 48 Ed. 3. 29. pl. 14. by Belknap: Obligation on which A. and B. Count was made alſo to C. and that they three have another Action pendant, is ill, 3 Cr. 202. pl. 31. *Quære* if Indenture for ſeven will ſupport Count on Leaſe for three years, Moor 35. pl. 116. Action by A. as Executors of B. is abate, if by the Teſtament there appear to be more, 5 Ed. 3. 59. b. pl. 93. Formedon in Remainder *eo quod A. le Bar. (ou tayl al males de Baron et Feme) obiit ſine*, &c. is good. Judgment apres View. 6 Ed. 3. 12. b. pl. 7.

James *againſt* Procer. Ante.

November 15.

(126) That Wales is annexed to England, and 24 H. 8. whereby Seſſions was appointed twice a year of all Pleas as fully as the Chief Juſtice of B. R. or C. B. and ſhall exhibit omnem aliam Juſtitiam, by color whereof they claim, but no Court of Equity ſhould ariſe, nor if it did, had they Conuſans of this Cauſe. Williams è contrà; but becauſe he had neither demurred nor pleaded to the Suggeſtion, a prohibition was awarded.

Stiles 150. pl. 337. Brownl. 29. pl. 28. Godbolt. 431. pl. 496.

Elliſon *againſt* Elliſon. Ante.

(127) Maynard moved that a Capiatur for a Miſericordia might be amended, becauſe it ſhall be eſteemed an Error of the Entry by the Clerks, not of the Judges pronouncing it, M. 33, 34. Eliz. Rot. 230. Wild *againſt* Wheler, in Ejectment, Judgment quod predict. A Recuperet *againſt* J. whereas it ſhould have been T. Tr. 19. Jac. Maſton *againſt* Shrimpton, and ſo when the Clerk hath no preſidents before him, as M. 14. Car. Everard *againſt* Boſvill, Debt upon 2 Ed. 6. part found for the Plaintiff which was well, part for the Defendant quod ſit in Miſericordia, but omitted eat inde ſine die, and adjudged amendable here; nor can any diſtinction be made betwixt Matter in Fact and Matter in Law, in a Judgment which is intire, and if ill pronounced is not amendable, and the party is not concerned though the King be that there be a Capiatur or Miſericordia, nor Revera was this ever the Error or miſtake of the Court, and therefore why the Rule of this Court ſhould not be as effectual as the Dockets of the Pronotories, in C. B. M. 12. Jac. C. B. Nelſon *againſt* a Miſericordia againſt one whereas it ſhould have been againſt both Baron and Feme, though doubt whether a Capiatur can be againſt Baron and Feme, and this is an Execution and therefore to be favoured; Wild è contrà; every Judgment entred is intended ſo pronounced, eſpecially no Declaration or Preſident being before him, the Pronotories Dockets in C. B. are like the Im-

Error.

3 Cr. 101. c. pl. 1.

Hub. 127. pl. 158. Rot. 1116. Yelverton 106. 148.

Imparlance Rolls, whereby the Iſſues are amendable, and no Preſident is againſt this Opinion: But the truth was, the Clerk found none in this point. Twiſden conceived, That Conceſſum for Conſideratum hath been amended; but 2 Cr. 32. not ſo here, although in the C. B. for the Reaſons before it may. Windham conceived, That though in Fact it were the act of the Clerk, yet having been an ancient Land-mark, it is not amendable, as it might be if it now began. And though Conceſſum for Conſideratum be amendable, theſe are different Judgments; and it were convenient it were amendable, though the Non-amendment hath cauſed good Laws and good Clerks: But by Windham, the beſt way to reform Clerks is to Fine them on Defaults. Poſt.

Godier *againſt* Clerk. Ante.

IN Ejectment by Special Verdict its found, That M. C. and Urſula his wife, in her right was ſeiſed, and in conſideration of a Marriage of their Son W. C. and Margaret the Daughter of Bromely, they demiſe to them for proviſion of Daughters children of W. and M. for 100 years, to begin when they dyed without Iſſue male, in truſt for payment of Legacies to the Daughters of W. and Margaret, then M. and Urſula levy a Fine, and ſuffer a Recovery directed by a Deed endorſed with this Leaſe, William and Margaret have Iſſue Male that dyeth without Iſſue, and whether this Leaſe ſhould commence or no, was the Queſtion. (128) Remainder.

(1.) Allen for the Plaintiff, Being to begin from and after the death of W. and Margaret his wife, without Iſſue Male, he agreed that the Leaſe is good in point of Creation, as hath been by all in C. B. and here agreed, being in the power of him that hath the Fee to contract for. 2. The Fine doth not deſtroy the Leaſe, as Chenyes Caſe, nor whether the Recovery deſtroyed it or no, though dubious, he waived as immaterial. But 3. inſiſted on the words in the Habendum, as the ſingle point, whether the words ſhall be conſtrued without Iſſue Male living at the time of their death, then the Term is gone; but if it be conſtrued whenever W. and M. dye without Iſſue, then its for the Plaintiff, and ſo is the literal Grammatical conſtruction and ſenſe; it being one thing to ſay H. is dead without iſſue, another that H. died without Iſſue Male; the former being true though he had Iſſue, if it dye without Iſſue, contrà in the latter. 2. This is the moſt vulgar conſtruction to ſay after the death of the Iſſue Male, that H. is dead without Iſſue, and ſo according to legal conſtruction, which in ſuch 3 Cr. 26. pl. 5.

points of Limitation is to be observed, as in a Formedon in Remainder such a Supposition is made, and not that all the Issues Male failed, and if so in Writs à Fortiori in Deeds, this being a Common Limitation to J. S. after the Death of A. without Issue; Sundays Case, Lands given generally to A. and after his Death without Issue, to B. this in a Will is Tail to A. 4. If the meaning should be at the time of the Death, it is Common experience to distinguish and express it in the Deed, else is there no reason to take such difference but must take the Case as it is. 5. When there is a doubt (Bishop of Bath and Wells) it shall be taken strongest against him that made the Deed. The objection, that it is made for provision of Daughters, it is gone by having Issue Male, and such Contingent can be no provision, yet this is not the bare intent, for if there had been neither Son nor Daughter yet the Executors of William the Son were to have the Term; and therefore it is as much for their benefit, and Countrymen and Citizens do usually provide for Daughters upon a failer of Issue male, and it is usual to limit to Sons particularly, and then in trust for Daughters, which though minus prudenter is very frequent, and a Remainder hath the same inconvenience as this if in expectancy, and 6. Where the intention of the parties is not certainly expressed, the Court must interpret according to the purport of the Deed.

2. Kettlewell for the Defendant, agreed the Case as opened, but conceived that his purpose, that Executors should have it, was as much confined to his death as if it were for provision, and this is a Condition precedent, and so destroyed by having Issue Male, Dike *against* Lake P. 1657. B. R. the possibility being extinguisht by having Issue and the commencement after the death of the Issue, is only from the Event, and so Arbitrary, and Verdict likewise should this Term hold, no alienation could be made by fine or otherwise for payment of Debts or Provision for Children; the Court conceived the words in equilibrio to either construction, and therefore the intent of the parties must be searched by perusal of the settlement. Twisden who argued this Case before, as Mr. Kettlewell, yet knew not why upon the Recovery. Windham cited the Case in Chancery under the Hands of the Judges. H. in trust ordered provision for Daughters upon the dying without Issue Male, they certified that when A. had Issue Male though that Issue dyed without, yet the Daughters had no portions in their Opinions. Adjornatur.

Aleway

In Damages Br. 52. Aleway *against* Roberts. Ante.

IN Scire Facias reciting, That in Mich. 18 Car. the Plaintiff recovered against G. Heir of C. Roberts, and that she should have Judgment against him of the Seisin of her Husband J. R. and by the Kings Writ she had Seisin, but no Writ to enquire of Damages: After which Giles R. dyed, and this Scire Facias is against W. the Heir and Ter-tenants who come in; some plead Non-tenure, others specially, That Cesar R. made a Lease for 99. years to one of them, from whom the Lands descended to G. and from him to William returned Heir, and a Lease for years if three lived so long, to another: And the Plaintiff Replies, That Cesar made a Feoffment, and so traversed the dying seised. Allen for the Defendant, conceived this Writ lyeth not in this Case: 1. Not for Damages only, the Defendants being not parties to the Judgment. At Common Law there was no Damages: And the Statute of Merton calls him Deforceator that must render them, which is he that doth detain the Dower. 2. The cause of the Damages is for the wrongful deteiner of the Dower, for without refusal, if always ready, the Plaintiff shall have no Damages, nor shall he be charged for such profits he receives not. 3. If there be a Writ of Enquiry, and Judgment given, yet its personal, and affects only the Lands of that person that is party to the Judgment, and the Execution is general by Fieri Facias or Elegit of the Lands the Heir had at the time of the Judgment, à Fortiori, where the alienation is before Judgment. 4. It doth not appear, till the Execution of the Writ of Enquiry, that she shall have any Damages, therefore no Scire Facias lyeth against the Ter-tenants to know why she should not, and whether the Damages shall relate to the death of the Husband, which is unreasonable as this Case is, or to the recovery, he knew not, nor what Judgment or Execution can be in this Case, that she should by this Alienation be defeated of her Dower is a mistake, and no inconvenience, for she may bring her Writ against the Heir, who is lyable, & vigilantibus non dormientibus; and should he alien, yet she may proceed, but the Damages being a personal wrong, it dyeth with the person; nor doth he know any President that the Ter-tenants shall be in this Case charged. Also he excepted, 1. To the recital of a Judgment in this Court, and sheweth not betwixt what parties. 2. She hath destroyed her own Supposition, That Tenants pleading Leases before the Judgment mentioned by her, 18 Car. and she pleaded a (129) Dower.

Feoffment in Fée to them long before, and alledgeth both seised; and so she hath Judgment against Giles the Heir of Cesar, whereas others of her own shewing were Tenants. Serjeant Say's for the Plaintiff, By the Scire Facias it appeareth to be Error here of a Judgment in C. B. and Judgment here but in 18 Car. and so default appears in the Plaintiff in the Scire Facias, because this shall relate to that, and the Judgment in the C. B. was long before such Feoffment pleaded, that the Scire Facias well lyeth against the Ter-tenants of the two parts after Judgment for the third, supposing the Error well brought, and so the Judgment in C. B. perfect, Tr. 17 Car. 1. Steward *against* Steward, Rot. 1270. before the Writ of Enquiry taken out, and the Error here was a Supersedeas to that Writ of Enquiry, and that this Court may award a Writ of Enquiry, which takes off any default in the Demandant, but that she may come here at any time, Dower Br. 13. although Judgment be by default, or upon demurrer, Dyer 313. 14 H. 8. 25. After Judgment by confession, this Writ was allowed upon search of Presidents; for by the Judgment the Damages are attached by the Statute of Merton, as a duty, and so he conceived Damages should relate to the time of the Husbands Death, and there hath never been any particular means to recover them but only the Court Ex Officio do enquire of this as of the other points in Dower comparable to 1 Cr. 342. 348. Lorton or Corton *against* 2 Cr. 175. Earl of Pembroke *against* Bostok, Damages given generally by the Statute of Quare Impedits is ascertained by the Court without any Writ of Enquiry, if it doth constare of the loss, but otherwise a Suggestion and Writ of Enquiry issue, and yet Damages may be against Ter-tenant, Yelvert. M. 5. Jac. Bromley *against* Littleton, where the Principal was never charged as the Executors were in that Case of Yelvert. P. 39. Eliz. Williams *against* Williams, Error in B. R. of a Judgment in C. B. and if there the Executors be lyable without the Principal, à Fortiori here where the Principal was charged that these are a duty by Statute, Vicount Mansfield *against* Worsley, M. 1658. C. B. Debt upon 2 Ed. 6. by Vicount M. as Executor, H. 1656. Rot. 148. for Tythes not set forth in the Life of the Testator, which were then a duty, and so not lost by the Death of the Testator; Thus as to the Matter that the Damages remain. 2. As to the manner it is well brought against these Ter-tenants, this Land being originally charged with Dower, and so most properly lyable and Scire Facias have often, 10 R. 2. Dower 158. been against others then parties to the first Judgment, as against a Guardian, 17 Ed. 3. 67. against a meer stranger,

10 Ed.

10 Ed. 3. 41. and it is well enough brought againſt this Land only, as Dy. 81. 149. or of all at Election, though it would have been hard to have charged the other Tenants of the third part of the other Lands, 4 H. 6. 49. Br. Aſſets per 3. is much ſtronger then this Caſe, and Dower is found when as here there is no Default in the party Plaintiff, but of him that brings Error, and ſo pray Judgment for the Plaintiff, in Scire Facias Defendant in Error. Twiſden, a Scire Facias againſt Bail doth not recite any Capias againſt Principal, and they do not recite all, but are ſhort, and therefore it not appearing it was Dower unde nil habet, is not material, which the Court agreed. And per Windham, all the Caſes cyted are after Judgments to recover Damages, but here is not any Judgment; and it is 48 Ed. 3. 19. a queſtion, whether he that in the firſt had pleaded that he had nothing, and after purchaſeth the Land in Scire Facias, may ſo plead, and this is a perſonal tort and they are given by Death; as per Twiſden, in Ejectment if the Defendant dye before the Writ of Enquiry Executed, the Dammages are gone, yet the Term is recovered, and the Statute will not help, nor per Foſter are the other Caſes like, being certain as here they are not, in Quare Impedit is quod Recuperet preſentationem, and the Defendant dyeth before the Damages be known. Twiſden conceived, that if the ſame Jury hath not given them, they are gone by Death; which Foſter agreed: And by Twiſden, the Scire Facias as to the two parts only is well enough: And the Plaintiff demanding Dower of John, which might be before all the others, the Pleas are frivolous, and had been naught upon Demurrer. Windham conceived the pleading ſuitable to the Scire Facias, and both ſtrange. Adjornatur.

November 16.

IN an Action upon the Caſe for calling the Plaintiff Whore, by which ſhe loſt her Marriage. Stroud Sen. deſired Special Bail, ſuch Special Damages being alledged in the Declaration, and ſworn true, Twiſden having refuſed common Bail in his Chamber; and here the Court ordered Special Bail. (130) Slander.

Colling-

Collingwood *againſt* Pace. In Denizen Br. 7.

H. 56. C. B. Rot. 1740. Ante.

(131) Alien. IN the Exchequer Chamber, Ramſen a Scot had Iſſue four Sons, Aliens, the eldeſt had Iſſue three Daughters, Aliens; N. the ſecond Son had Iſſue Patrick, who was born in England, and had Iſſue W. born at Kingſton; after the third Son, J. Earl of Holderneſs, being naturalized by Parliament; as alſo George the fourth Son by another, after John conveyed to himſelf for life, Remainder to his Wife, Remainder to his Heirs, and ſo ſeiſed, deviſed 6 Jan. 1 Car. 1. to his Wife and her Heirs, if he dyed without Iſſue of his Body, and other Lands to his Executors, paying to his Brother N. an Annuity, and to Sir G. and to Sir Tho. for forty years, and ſo to Alexander another Brother, and then to the Heir of Nicholas, and his Heirs, he deviſed all his Lands in queſtion, paying his Debts, and then dyed without Iſſue, his Wife ſurviving, and entring, married the Lord Willoughby afterwards; G. dyed having Iſſue John, who after dyed, and after by Inquiſition its found as before, and that J. Earl of Holderneſs dyed without Heir, and that the Lands in queſtion are Eſcheated, and that Ed. Ramſey took the Profits till his death, W. R. after, which the King granted to Murry, who conveyed to the Defendant the Leſſor of the Plaintiff, and the Earl of Elgin claimed by the Heir of N. which appeared by Special Verdict. Poſt.

Veere Informant *againſt* Sampſon, &c. in the Exchequer Chamber.

(132) Drapery. IN an Information by Bill Qui tam pro Domino Rege quam pro ſeipſo, for not paying Subſidy for new Drapery to the Aulnager. Finch for the King prayed, That all the Judges here Aſſembled would ſettle it by order; but it being difficult, and not debated before, as the other Caſes had been, and the Judges of each Court divided, by Bridgman Chief Juſtice, and by Foſter, this Caſe is not adjourned for difficulty, nor is like Calvins Caſe, which was primæ impreſſionis; this hath had a courſe in the Court. Hale Chief Baron, The Conſequence is ſo great, and it hath been already adjourned into this Chamber; and therefore this was brought hither by the Barons, not by the Kings Counſels advice. Bridgman Chief Juſtice, conceived it more fit in this Caſe to deliver their Opinions

nions at Serjeants Inn, as the Kings Counsel; which Hyde agreed, but contrà by Hale, Atkins, and Tourner Barons, and Bridgman Chief Justice doubted whether in this place any interlocutory Order can be made to settle the Possession; and 2 Jac. P. & Tr. cited by Foster, That by the Opinions of all the Judges, this Case was settled upon the Kings sending to them, which Twisden also conceived necessary here; wherefore they waived it.

The King *against* Field.

November 18.

(133) Coron. THe Clerks conceived, that being Returned by Habeas Corpus, Indicted for seditious words, he need not come to the Bar, because he might have appeared by Attorney, which the Court denied. 2. The Indictment was upon the Statute 13 Car. 2. cap. 1. by direction of Sir ol the Counsel. 3. If any be Indicted of any high Crimes, as Præmunire, he must be Arraigned at the Bar, but contrà where he may put in Bail. Post.

Pendavis *against* Collins.

(134) Amendment. UPon the Plaintiffs amending his Declaration, he hath Election to pay Costs, and so go to Trial, or to give an Imparlance; but if the Defendant mends also, he may proceed, and Costs need not on either side.

(135) Amendment. IN Action upon the Case, Jones. The Record was for detayning in Prison, which was omitted in the Writ of Enquiry, and for that variance he desired the Writ may be Quasht; but because there was only a Paper Copy and not the Record it self. Adjornatur.

Wagstaff *against* Temple.

(136) Amendment. AFter Issue or Demurrer, the Continuances are helped by Verdict, but when the Plaintiff hath liberty by Rule to discontinue, the Defendant by proviso must take care to enter Continuances; and because nothing was set down in the Paper, the Court would not adjorn the Jury, to give occasion to the Defendants Attorney to enter Continuances.

Tubb

Tubb *against* Wallwin.

(137) Averment. THe Plaintiff in Ejectment moved by Winnington in Arrest of Judgment, because the life of the party, 10 Ed. 4. 18. during whose life the Defendant hath a Lease, was not averred; which by 21 Jac. 13. is to be inquired by the Sheriff, or other, as the Court think fit. And Foster cited a Case of the Lady Morley, where the like Rule was made before the Statute, after Verdict as here.

Johnson *against* Drake. Ante.

(138) Admiral. HOwell prayed a Prohibition to the Admiralty, because in a Suit there upon a Charter-party, the Plaintiff in his Libel suggested an Agreement upon the high Sea for performance of the same; which the Court granted, upon putting in a Suggestion here, that all was done on Land.

Ellis *against* Yarrow. Ante.

(139) Trover. TRover pro duobus Pullis, Calthorp moved for Judgment, That this properly signifies a Colt L. Entr. 38. though it also hath a signification of any young thing. Foster & Curia conceived that an Anglicè would not here help. And by Twisden, although the Colt loosed in Scripture be translated Pullus, yet it hath been adjudged contrary in C. B. & 1 Cr. Sprig *against* Rawlison, A Nil Capiat was awarded, and here Judgment per Curiam was staid.

Towes *against* Lewis. Ante.

(140) Bail. ACcount in an Inferiour Court, and upon it Bail, (upon return of it by Habeas Corpus hither) enter into Recognizance, that if the Defendant be convict to account he shall appear, and if he make Default the Plaintiff shall have Execution against the Body Lands and Goods of the Bail, the Breach was assigned, that the Court assigned a day for his appearance after Judgment quod computet, and he made default and they rendred not his Body to Prison.

Judgment for the Plaintiff, Nisi.

Booth

Booth *against* Beard.

IN Error to reverse a Judgment, because the Original certified was (as the Case of Batchelor *against* Tanor) subsequent to the Imparlance, which the Prothonotaries certified, being before Judgment, was good enough to support it, though the contrary had been resolved by Roll; and that the Court shall not intend any new Original. But this Court was of another Opinion and left it till the Prothonotaries certifie the course in C. B. by which this Court will be ruled. Post. (141) Error. Godbot. 408. pl. 488. Yelvert. 108. pl. 151.

Web *against* Marten.

ACtion upon the Case upon promise, that if the Plaintiff would deliver a writing upon request to the Defendant, the Defendant would redeliver it, and pay 40 l. upon request: The Defendant pleaded non promisit within 6. years, to both which the Plaintiff demurred, as no good Plea to the one, and good to the other, which on general demurrer by the Plaintiff cannot be good; the last was a promise in Law accrewing by delivery of the deed, and requests no more then the Law implies but per Jones. This is fact and Collateral and a request necessary, and waived the insufficiency of the Plea which reacheth only one part; Twisden conceived that when the promise raiseth a present debt as upon delivery of a Horse to pay, request need not be exprest; and per Curiam, such is the payment of this Money; and Twisden conceived that a Plea in Bar of the whole answering but part, is insufficient. 2. The deed which was the ground of the consideration, was the Defendants own deed, because it concerned his Title, 9 Ed. 4. and so the consideration void, but per Curiam, though this be not good by way of accord in Trespass, yet it is for an Action upon the Case. 3. The promise was to deliver a Parchment Deed or Writing, which per Curiam is frivolous, and Bridges *against* Hide, such a plea of the Statute was ruled naught for the whole, being an Annuity to be paid yearly, whereof part was within, part not in the Statute. — Adjornatur. (142) Assumpsit.

Hames *against* Baily.

(143) Covenant. THe Plaintiff covenants, That if the Defendant would pay 40 l. he would convey as the Counsel of the Defendant should advise: And in Action of Covenant for the Money, the Defendant pleaded, That the Plaintiff did not convey as the Counsel did advise, which per Curiam is naught, without particular shewing the manner, and what the Counsel did advise. And 2. these being mutual Covenants cannot be pleaded in Bar one of another, which was assigned for Error. And Judgment affirmed. Nisi.

Entr. Congeable Br. 2. Granger *against* Hemborough. Ante.

(144) Departure. 3 Cr. 62. pl. 5. ON Chapman *against* Chapmans Case adjudged in this point, Hut. 90. Jones conceived this no departure, nor the same with that Case which had payments in the Condition, as well as general words of Performance: And Hub. 8. Baker *against* Spaine is the same, that its no departure; for he might have pleaded Nil debet generally, this Entry being as an Eviction or Release. Foster, If the Covenant was to pay during the Term, the Term must be continuing, contrary if it be generally for payment of such Rent, which difference hath been agreed in C. B. Twisden, It should have been pleaded, That the Defendant had performed Covenants specially, paying his Rent till such a day that the Lessor entred, which the Court agreed, and that this general Performance is intended of an actual Performance, Yelvert. 3 Jac. Jeoffry *against* Guy, and so this Entry a departure in Action of Debt, a breach of Covenant being assigned by the Plaintiff; but the Defendant must excuse himself in his Plea in Bar, 1 Inst. 303. And by Twisden upon general Performance pleaded, the Plaintiff replyes Rent arrear: The Defendant cannot rejoyn by want of a Demand, though he might have excused himself by pleading a Tender in Bar. Judgment for the Plaintiff, Nisi.

3 Cr. 828. pl. 33. c.

Dyer 253.

Burton *against* Gunvill. Ante.

(145) Error. Br. 5. DAmages in Action upon the Case for false Imprisonment, are joynt against all the Defendants, and several as to the Assault, which was agreed well enough; but the Error assign'd and relyed on in the Judgment in C. B. it was quod Recuperet Twenty shillings Damages pro misis & Custagiis, beside the damages de incremento distinct from & ultrà his damages

damages for the Treſpaſs; which by Allen is well enough, being Surpluſage, and only to aſcertain how much of the damages are for Coſts, how much for the Treſpaſs, but all are damna, and in the end are ſum'd up quæ in toto ſe attingunt. Jones conceiv'd the Forms are ſo ſtrictly obſerved in Judgments, the Concordatum & Conceſſum hath been ruled void. Windham conceived that this is no more expreſſed then was implyed in true Conſtruction, which the Court agreed; but that this is variance from the ancient Form, therefore Adjornatur to ſearch Preſidents; though Twiſden thought the Damna pro miſis had been for Intereſt. 2. The Writ was directed to remove a Record coram Roberto Foſter & Sociis, and its return by F. and Hyde, which by Wild the Kings Serjeant, is not good, but both ſhould have been named in the Certiorari, which is the courſe of Fines pleaded, 1 H. 7. 10. b. But by Twiſden, Since the Statute of 4 H. 7. all need not be named; and ſo they conceived this Return well enough, and could not have been Socii. Poſt.

So is 2 H. 6. 10. pl. 23. Lows Ca.

All need not be named in the *Certiorari* but they muſt in the Certificate of the Fine. 1 H. 7. 10. b. pl. 13.

..... *againſt* Weſt.

November 19.

(146) Bail.

COmmon Bail is only requirable in Action upon the Caſe for ſlandering of a Title, without Special Order, which the Court would not grant.

James,

(147) Treaſon.

HE was Indicted (and found Guilty) for Compaſſing and Imagination of the Kings death, and intending his deprivation, manifeſted by preaching at White-Chappel, after the 24 of June 1661. viz. 18 October, affirming of the King and his Nobles, That the King was a Blood-thirſty and Tyrannical King, and ſo of the Nobles; and that the Cup of their Iniquity was almoſt fill'd with the Blood of the Saints a year ago, but the putting of the Covenanters to death in Scotland, had (to fit them for deſtruction) fill'd it fuller; and he was ſorry he had neglected his opportunity of fighting the Lords Battel, but hoped that if ever he had it again, he ſhould conſider it more fully. Serjeant Keeling opened the Indictment (the Court on his deſire refuſed to allow any Friend to take Notes for him) Mr. Attorney General further obſerved, That the intent and imagination was the prime Treaſon, the Preaching an Evidence of it, which was the Law before any

Statute made in the World, as ancient as Monarchy it self; but the uncertainty is bounded by the Statute, 25 Ed. 3. which is only declaratory of the Common Law for the ease of the Subject, bare words at Common Law being Treason, this is more then that preaching is an overt Act, at least by the Statute of 13 Car. 2. cap. 1. of preserving the Kings person, that he endeavoured not only to overthrow the King, but Monarchy (that divine rule from all antiquity) in this Land. After the Evidence that swore the words punctually, the Prisoner objected against the Testimony. The Court summ'd up the Evidence, and Verdict pro Rege.

Tricket *against* Hanby. Ante.

(148) Varyans. IN Action upon the Case upon promise of forbearance to sue the Defendant as Executor, de son tort, and stay till he and they could go to Liverpool to fetch Books. Lindly moved for Judgment that it is well, the consideration, being till he or they could send, and the Breach assigned that he staid till they might have sent to L. which is well enough after Verdict, and it is said he did forbear to implead him, them or either of them, till, &c. but per Curiam, the promise must relate till he and they may send, and therefore must be so applyed, especially being Conjunctive and not disjoyned, he or they. Post.

Wallis *against* Ust. Ante.

November 20.

(149) Slander. IN Tr. 1660. The Defendant pleaded Not guilty; the words were spoken in July 1659. and Wallop conceived the Judgment ought to be upon the Act of Judicial proceedings, which by the word proceedings had confirmed the pleadings, as here the words being indefinite in the Title, and so what is not excepted is confirmed; the intent of the Lawmakers being evident in what they intended not to confirm. 1. Proces in High Courts of Justice. 2. Outlawries or Indictments of persons for their Loyalty, these as malitious were left out; but all civil proceedings were intended to be confirmed for civil peace, not only such as were executed by Judgment, &c. but such as were Executory, and depending not only upon ancient, but also by any latter Laws, which was the principal provision of the Act, and so the Declaration being well begun, here they are as effectual as upon a good Act of Parliament, though by

by the reason of the Common Law these words might be proved a foul Scandal, and it would have been fruitlesly confirmed if proceedings cannot be upon it. Bartholomew contrà, and that the Act doth not extend to make these words Actionable. but only to be so far good as in English or wanting Legal Power, and the words were only Actionable, as a Consequent of a pretended Act that inflicted a punishment on such offences, which is now taken away, and so the words cannot be said Actionable at the time of the speaking: And had there been a Libel for fraight pending without Sentence, he conceived this Court would send a Prohibition. Twisden, if H. before the Act be indicted for Adultery, he cannot now be hanged for it; and per Foster, according to this Rule all Actions pending by Writ or Declaration should receive Judgment now as upon effectual Acts which he conceived not in private interests, but only in Matters of publick concernment and good, and by Windham it would be dangerous thus to proceed, because they made many Laws against the King himself, and therefore the Acts were only to help defects of power in the Courts, not of the Laws made, unless only that they were in English, but if any of these Actions had received Judgment, they may be said pending within the Acts. 2. The words are Actionable, because this Court may punish it by Fine and Imprisonment, 3 Inst. 206. 1 H. 7. which the Court denyed, which is the ground that a Procedendo is grantable to London where such words are Actionable, and no Appeal lyeth hither, though a Bawdyhouse is punishable as a Nusans, so of a Pimpe, Dimmocks Case, nor was ever the Jurisdicton of this Crime of Adultery in this Court. Nil Capiat per Billam awarded per Curiam.

Dacie *against* Linch. Ante.

(110) Slander.

Of a Minister that he is a Thief and a Witch, and deserves better to be hanged then A. To the latter part, the Statute of Limitations was pleaded, and a Replication that a Latitat was taken out before and continued, which is good enough. Adjornatur. 184. pl. 158.

Dawson

Siderf. 66. pl. 39. Dawſon *againſt* Read.

November 21.

(151) This would have abated the Writ, as in Account. 4. Ed. 3. 31. pl 11. but not a *Scire Facias* or *Charter de pardon* where he was named J.S. the elder, 18 Ed. 3. 7. b pl. 24. nor J.S generally named although he be the younger ſhall not ſtay Seiſin *del terre* on Default at Grand Cape, 9 Ed. 3. 20. pl. 5. 3 Cr. 57. pl. 7. Hitch. 9. pl. 31. 1. Brownl. 55. pl. 294. Such variance betwixt Counts and ſpecialty hurts not, 39 Ed. 3. 22. pl. 11. nor between the Count and Warrant of Attorney, ſo L. 5. Ed. 4. 23. pl. 20. 2 Leond. 147. pl 181. but 8 Ed. 3. 20. pl. 5. is expreſt that Writ againſt J.S. by Averment that the Defendant is named J. S. *le fits* and not J.S. barely is abatable.

THe Venire Facias was J. S. of Dale generally, and the Pannel was J. S. of Dale Junior, Wilſon *againſt* Stubs. Hub. 330. By Allen in Arreſt of Judgment that this is a material Variance as Gregories Caſe. And the Diſtringas being right, by Windham, here is no contradiction but one perſuant to another, and per Curiam if he be the ſame Man, of which the Sheriff ſhall be examined, all is well enough.

Adjornatur.

Gifford *againſt* Smith.

(152) Scire facias. 3 Cr. 738. pl. 9.

BY the courſe of the Court, Scire Facias againſt the Bail muſt have ſeven days betwixt the Teſte and Retorn, (Sanders *againſt* Holday) elſe are all proceedings after void, per Finch Solicitor General for the Defendant, which the Court agreed, and that one cannot be taken out Retornable more, and the other within leſs then ſeven.

Scudamore *againſt* Belliſon.

(153) Leaſes.

TEnant in Tail Baron and Feme, Remainder to the Huſband in Fee: The Iſſue after the Fathers Death, and in the Life of the Mother levies a Fine to J. S. after which the Mother Leaſes for 21. years to the Plaintiff, in Evidence to a Jury, the Court conceiving this no Leaſe within the Statute, Croker *againſt* Keſly, 2 Cr. 688 and Bridgman but at Common Law, and ſo only avoidable by the Iſſue, not by Feoffees or Conuſees, per Curiam, wherefore they would not have any ſpecial Verdict. Beaumonts Caſe in Fine per Windham is to the like effect, there being no reaſon the Fine of the Iſſue ſhould abridge or ſhorten the power of the Wife. The Leaſe of the Biſhop not warranted by the Statute, is only avoidable by the ſucceſſor, not by himſelf, per Curiam.

Wri-

Wintle *againſt* Danby.

ERROR of a Judgment in C. B. per Windham. 1. The Venire Facias is Cam, and the Diſtringas Cham, which per Curiam is no Variance, if it were the party, ſhall be examined per 21 Jac. (154) Varyans.

Taylor *againſt* Smith. Entred Hil. 60 Rot. 1413.

IN Debt for Nonperformance of an Award, the Defendant pleaded no Award made, the Plaintiff ſheweth that at ſuch a day and place the Arbitrators took upon them, &c. and awarded, &c. which per Jones upon demurrer by the Defendant is not good, no place appearing where the award was made, but per Curiam being but one Sentence, it is well enough; contrà if it had been that poſtea ſuſcepit onus Arbitrandi he awarded, &c. Judgment for the Plaintiff; but Twiſd. doubted, becauſe every mans Plea ſhall be taken ſtrongeſt againſt himſelf, and therefore ad tunc & ibidem ſhould have been added. (155) Arbitrement.

Capenhurſt *againſt* Capenhurſt. Ante.

WILMOT conceived that this aſſignment by Leſſee of the Lands for ſo much of a Term, as ſhould be unexpired at the time of his death, &c. good; and Child *againſt* Bailys Caſe was by deviſe to J. S. of ſo much as ſhould be unexpired at the death of the party, which affixeth the deviſe to the Land, but per Wil. the Limitation being uncertain what ever the deviſe be, it is void, as Gravenors Caſe in Dy. 150. pl. 83. which Twiſden agreed, and that it had been the ſame in a grant, contrà where the Limitation had been certain, and the commencement uncertain. Judgment for the Defendant, Foſter and Mallet abſent. (156) Aſſignee. Godbolt 24. pl. 35. 3 Cr. 9. pl. 2. 3 Cr. 128. pl. 4. 3 Cr. 796. pl. 42.

Whi-

Whitacre *against* Pellington.

November 22.

(157) 3 Cr. 853. pl. 18. Stiles 216. pl. 493. 1 Brant. 310. pl. 748. 2 Cr. 5. pl. 5. Godbolt. 382. pl. 469.

ERror of a Judgment in C. B. that the Plaintiff in Treſpaſs and Ejectment was an Infant, and yet appeared by Attorney; but the Verdict being for him, it is helpt by 12 Jac. of Jeoffailes. Per Curiam contrà, if the Judgment had been againſt him. Judgment reverſt, Niſi.

Dacie *againſt* Linch. Ante 181. pl. 110.

(158) Slander.

THe words per Windham are Actionable, whether A. were hanged or no; and by this aggravation ſuch a Witch is ſhewed, that 3 Cr. 62. pl. 4. is Felony by 1 Jac. which Twiſden and the reſt agreed; contrà if it had been generally Witch, or that he deſerved to be hanged. Judgment for the Plaintiff.

The King *againſt* Story.

(159) Peace. Den. 206. pl. 248. 279. pl. 340.

LIndley excepted againſt Indictment for peaceable entry and forcible deteiner, becauſe it was quod parifice ingreſſit in liber without a daſh, for both which the Indictment was Quaſht, per Curiam, and Fine ſet on the Clerk of 40 s. 2. Reſtitution cannot be given the laſt day of a Term, nor without day given to ſhew Cauſe againſt it.

(160) Replevin.

ON 8 H. 4. Spencers Caſe, when the Sheriff upon a Replevin of Goods ſaith, that none came to ſhew him the Goods, this by Winnington is no good Return, without ſaying they were eloined; ſed Curia contrà, for he cannot know the Goods without ſhewing of the party; but the Writ not being filed the Court would do nothing.

Lee *againſt* Pave.

(161) In Det.

THe Defendant entred into Bond to the Sheriff, whereupon the Sheriff was to diſcharge the Defendant of another Execution, which was taken out double after ſatisfaction of the debt; but by Twiſden, he never knew the Sheriff ordered to deliver the Bond, which is his only Security; which the Court agreed.

Maire

Maire *against* Spencer.

SCire Facias against Bail upon 3 Jac. 8. in a Writ of Error: The Defendant pleaded that the Principal M. did prosecute with effect, and that the Judgment was reverst. Jones conceived, That because he had not concluded by relying on the Record, but only Hoc paratus est verificare; that the Plea was not good, he having demurred for that Cause, and that he only prayed Judgment si Actio; the Court conceived, although nul tiel Record were pleadable, yet they ought to have pleaded prout patet per Recordum, per Curiam. (162) Bail.

Gunnel *against* Burton. Ante.

THe Court, as hath been ruled in the Exchequer Chamber, will not hear such as by motion endeavour to feel the Opinion of the Court before they have given their positive Judgment, it being before them. And in this Case by Windham, Sociis for Socio is only false Latin, which will not abate the Plaintiffs own Writ of Error; contrà by Twisden, it being an Original, its not answerable to the Writ, which Mallet agreed. Foster conceived it a Case fit to be moved at Serjeants Inn, and therefore would not deliver his Opinion. (163) Error. Br. 5. An Attorney may plead a *Misnomer* in the Surplusage of his Masters Name. 2 H. 6. 11. b. pl. 1. A. Indenture pleaded betwixt C. and B. which was betwixt C. and A.

Adjornatur.

and B. good. Issue that money was not paid for White Acre, if it were paid for that and Black Acre is against pleader. H. Count *in dum fuit infra ætat.* on Lease by him, which was by H. and A. good. 6 Ed. 3. 55. pl. 61. Repl. of Beasts is void, if but one were taken. 7 Ed. 3. 15. b. pl. 12.

Baron cannot vouch sale on Warranty to Baron & Feme, 10 Ed. 3. 53. pl. 34. contrà, So Record certified as before three, which was before four Justices, is good, 2 Ed. 3. 4. b. pl. 13. *Contrà* in Attaint on Oyer *coram* four, which was before but two, 2 Ed. 3. 8. b. pl. 2. So a *Recordare* of Suit inter A. Plaintiff, and B. Defendant, is no removal of Suit *inter* A. Plaintiff, and B. &c. Defendant, 2 Ed. 3. 35. pl. 23.

Granger *against* Henborough. Ante.

IN Hub. 8. this never came in question; but 1 Inst. 304. by Windham is expresst, and so he conceived it here a departure. Twisden conceived no difference betwixt this and Chapmans Case, and the rest to the same intent. (164)

Judgment for the Plaintiff, Nisi.

Parnell *against* Rowe.

(165) Trespass. IN Trespass for *pedibus ambulando*, and eating with Cattle in 6 Closes. The Defendant justifies in two Closes by a Foot-way, and to three of the rest, that it was contiguous to his Land, and the Plaintiff ought to Repair. The Plaintiff replyed, That three Closes were well repaired, and that the Defendants Cattle were unruly. The Defendant demurreth, because the Travers is Absque hoc, that they were not ruinous; as also that the Tenants of those Closes ought not to repair by Prescription, as the Defendant alledged, is not good, not repaired being a good Issue. And by Serjeant Bear for the Defendant, the Custom is alledged, that all the Tenants of the six Closes ought to repair, and the Plaintiff answers but to three. Also this is double, 19 H. 6. 41. and hath immaterially traverst the Contiguity of the rest, 20 H. 6. Yelvert. H. 9 Jac. Durrant *against* Child, which dividing the Pleas is not good. By Windham, all these are but several Causes and Inducements to his Traverse, his Conclusion being only relying on one, and the Contiguity of the other three may be well enough traversable, although the Plaintiff be bound to repair; for the Cattle might go through one mans ground into another, because he is hereby excused as to the Defendant, which Twisden & Curia agreed, 16 Car. adjudged that H. seised of Bl. that ought to repair against B. yet if the Cattle of A. come through the Lands of B. 21 H. 6. in Trespass by H. A. cannot plead default of repair in H.

9 Ed. 4. 39. b. Per Danby.

Adjornatur.

Wills *against* Griffith.

(166) Bail. ROlls would not take Bail of the Real Debtor to the Garnishee upon the removal of the Suit in London by Certiorari, but Berclay contrà; In Action of Debt, the party in whose hands the Goods of the Defendant are attacht appeared, being the Garnishee, after which, to try the truth of the debt, the Defendant removed the Suit; but the Garnishee prayed he might here put in Bail to him, or else a Procedendo might be awarded; which Hern Clerk, upon search of Presidents, reported as aforesaid, and it was awarded. Nisi.

2 Leonard 173. pl. 20.

Jones

Jones *against* Philpot. Entr. Congeable, Br. 140.

November 23.

1 Lev. 49. 1 Sid 63. ✓.

IN Ejectment by Special Verdict its found that R. was seised, and enfeoffed C. W. and his wife, and the Heirs Males of their bodies, they had Issue Giles and T. They make a Feoffment, and then the Husband dyes, the Wife enters and makes a Feoffment in fee, for which G. the Son enters by 11 H. 7. The Case was, Husband and Wife, Tenants in Special Tail to the Heirs of the Husband of his provision, make a Feoffment, which being a discontinuance, the Wifes Entry by 11 H. 7. cap. 20. being lawful, notwithstanding the Use limited to her, and so her Feoffment Quoad, the Tail is a Forfeiture, by Jones for the Plaintiff, which the Court agreed, because her Entry was Congeable; but during the life of the Husband she cannot be remitted. And by Twisden, although H shall not be remitted against his own Feoffment, yet if a Disseisor will make a Feoffment to the use of H. Tenant in Tail, H. is remitted, if the Feoffment of the Wife, being to him in Reversion, be a discontinuance (which the Court would not positively say, but conceived not) yet if not, the Heir is also Heir in Tail, and so his Entry Congeable, quacunque via data; if the Reversion be in the Donor, the Tenant in Tail by Feoffment to his own Issue cannot bar him; contrà where the Reversion is in another.

(167) Baron & Feme. 2 Leonard. 222. pl. 282.

2 Readings 68.

Judgment for the Plaintiff, Nisi.

Barrow *against* Hewit. Ante.

BUck moved for Judgment, because the Mittimus to the Justice, certified by the Chief Justice, as Harrison *against* Morpeth, 1654. C. B. is well enough, as in that Case to the Justice of Ely; and so Jones *against* Williams, 1658. a Record betwixt Generosos returned inter Armigeros, is well enough: And 2 & 3 Ed. 6. cap. 28. calls him the High Justice; and 43 Eliz. calls this Justicer: And had the Certificate been by his proper Name, 1 Cr. 189. Bethels Case, it had been well enough, 2 Cr. 368. Lister *against* Ravenscroft, Præcipe guardianis, the Writ of View was Guardiano, yet well. And Hub. 138. & Hub. 135. comes not to this Case, being direct to the Justice of Peace, Certificate by Clerk of the Rolls, Trin. 24 Car. 1. And the Case of a Writ directed to the Commissioners of the Sewers, certified by their Clerk, and ruled

(168) Error Br. 420.

Stiles 90. pl. 189.

good: And so here by Twisden & Curiam, for the Court will not presume any other. Judgment for the Plaintiff, Nisi.

Siderf. 64. Tirry *against* Browne. Ante.

(169) Marriage. IN Trespass for entring his House, spoiling his Goods, and taking away his Wife: As to the former, they find the Defendant guilty; and to the Wife, they find the Act of Marriages (which was made 1656.) and that after Febr. 1658. the Act was to end: and that the Marriage was in April 1657. and dissolved by the Justices in their Sessions within six Months after the Marriage, according to the direction of the Act, by Petition of the Wife and her Parents, being without their consent, which is confirmed by the Act of Judicial Proceedings, which comprehends Orders of Sessions. But by Windham, this Sentence should have been upon the Verdict of a Jury, not by Petition; which Foster Ch. Justice agreed, the words of the Act being, that they should do it by Tryal, which cannot be by private Information in this manner, but by Jury; and their proceedings being erroneous, are not confirmed. But by Allen for the Plaintiff, this was the general way of Fact that was practised in those irregular times, and the Consequence of this would be great: And (by Windham) when they are once well married, all the world cannot dissolve the Marriage; for an Act of Parliament in this sense, against the Law of God, is void; and this doth properly belong to the Ordinary: And Bales Case, being a second Marriage, at which Sentence (by Wild) Rolls Chief Justice would not be present, that dissolved her first Marriage, but conceived it could not well be dissolved. And by Twisden it hath been resolved, That a Process by Petition before the Justices of Peace is void upon the general Law, and the same Causes that might legally annul it then, will do it now in the Spiritual Court, and therefore the party is at no inconvenience: but the Court would give no Judgment, because the Verdict hath found that which is not here examinable; and this is not by force, but only without the consent of Friends. And by Allen the power of the Ordinary is delegated to the Justices: But per Curiam, not that they may proceed by the Course of the Civil Law. Curia advisare vult.

Helier

Helier *against* Gray.

ERror of a Judgment in Briſtow, if they trye by twelve, they may ſummon an hundred by Cuſtom; but by Cuſtom a Tryal cannot be by fewer or more then the Law appoints, per Curiam. 2. In Inferiour Courts it is needleſs in the Diſtringas to return the Jurors Quorum quilibet habet ſo much, becauſe the Statutes only include the greater. 3. The Venire, by Jones for the Defendant, by Cuſtom may be to 24. ad recognoſcendum, ſo but twelve Execute it. And by Foſter, it is in purſuance of the Rules of Law, and ſo good, which Twiſden agreed, although they cannot nominate by general Allegation of Cuſtom; but it being here ſpecially pleaded, the Court conceived it well enough. Judgment affirmed, Niſi. (170) Tryals.

Bars *against* Deſman. See Baron & Feme, Br. 1.

IF the Sheriff return Cepi Corpus, the Wife may have an Idem dies, 2 Cr. 58. 11 H. 4. 71. 89. Dy. 271. And upon an Exigent if the Feme will appear, ſhe ſhall be received, and he have an Idem dies; and ſo if he be Outlawed the Wives appearance may be received, and when the Husband comes in by Proceſs after, he ſhall not be received, as Mayherns Caſe, till he bring in his Wife: The Caſe at Bar being an Action of Det againſt Baron & Feme, upon the Latitat the Feme appeared, and ſhall be accepted, per Curiam; but where the Feme is in Execution, ſhe ſhall not be diſcharged; Nor could the Lady Baltinglaſs, who was in Cuſtodia only upon Proceſs. But per Curiam, ſhe ought to be diſcharged, and that without Bail, if it appear upon the Writ that ſhe is a Feme Covert, but if ſhe be ſued as a Feme Sole, ſhe ſhall put in Bail. And per Twiſden, it is an unreaſonable courſe, that the Wife, becauſe ſhe cannot appear by Reddidit ſe, but in Cuſtodia, therefore ſhe ſhould not be diſmiſſed, as in C. B. elſe would this be as good as a divorce, a continual Non eſt inventus being returned againſt the Husband, and no Declaration can be againſt her, and ſo ſhe ſhall be always in Priſon; and the Clerks conceived, by the courſe of the Court, ſhe could not appear, and diſcharge her ſelf. Sed Adjornatur to ſearch Preſidents, (171) 3 Cr. 370. pl. 9. 1 Brownl. 46. pl. 254. 2 Cr. 445. pl. 23.

Rum-

Rumsey *against* Atkinson. Ante.

(172) Jurisdiction. 3 Ed.1.cap.35. 3 Cr.105.pl. 15.

IN consideration that the Plaintiff had taken pains at A. about a House in B. which appears not to be within the Jurisdiction of the Marshalsey, which was here assigned for Error: But by Wild for the Plaintiff in Error, Defendant there, that the principal Cause of Action is on a thing executed, and the promise the ground of the Action, and is not for a Quantum meruit, whereby the House should come in question. Allen for the Plaintiff. It is not enough that it doth not appear to be out, but it must appear to be within the Jurisdiction, which hath been a constant Rule. 2. Though the consideration be past, yet if it had been for going to Windsor, it had been naught; which Wild agreed. And here this procurement of the Lease of the House in B. is local, and must be shewed to the Jury: And by Windham, had this only founded in Damage, without the Jurisdiction, 1 Cr. 570. it had been well enough; but this procurement is part of the thing it self, which the Jury must enquire of in the Issue; the taking pains is not sufficient, or about a Lease generally, but about a Lease of this House in B. particularly. And so by Twisden; all Inferiour Courts are tyed up, but these Courts may enquire, any where; and he conceived this a flat Error, and Foster likewise. And this is not like a promise at Hull, that if the Plaintiff would deliver his Horse at Hull for the Defendant to ride to Beverly, the Defendant would deliver him at Hull again; here all Enquirable is only at Hull, & not the riding. Judgment reversed.

3 Cr.44.pl.14.

2 Leonard.104. pl. 132.

Siderf.65.pl.28. Serjeant Mortons Case *against* Spencer.

(173) Priviledge.

HE being to attend in C. B. the Court conceived, That this Court could not award a Prohibition to the Admiralty, in a Cause wherein he was concern'd: But by Allen the Court may be prohibited, although any party could have priviledge, because it appears upon the Libel, that the Cause is not within their Jurisdiction, and Priviledge in this Case lyeth not, for no Suit is commenced against him. And if a Serjeant would sue in an Inferiour Court, this Court might Reverse that Judgment by Error. And by Foster, this Action was commenced before he was Serjeant, and he was not named Serjeant, and therefore non constat he is the man unless he comes in by Plea. And by Twisden, If a Serjeant had sued in Spiritual Court for a Legacy due out of the Orphans Court in London, a Prohibition would lye here: But by Wind-

Windham, Priviledges are not to be pleaded as other Pleas, and therefore this Court waiveth not their Jurisdiction by leaving it to the C. B. where he is resident; but they can also award a Prohibition, and Conusans is thus demanded à Latere at the Bar by motion, as this is. But by Allen, Conusans is ex debito Justitiæ, and without special favour, its claimed by matter of Record put into Court; but this Priviledge is not claimable of right, but of favour without a Plea; and plead it he cannot, here being no Prohibition: But the Court refused to allow his Priviledge without Plea, otherwise than by agreement of the parties. Post.

Dawson *against* Read. Ante.

November 25.

KEeling, the Kings Serjeant, prayed Judgment, because H. 11 Car. Rot. 703. B. R. Price *against* Isake, adjudged, that if he that is mis-named in the Venire, if he be not sworn, its not material, P. 11 Car. which the Court agreed, being in an Information at Common Law, not upon any Statute, and therefore needs not the help of the Statute of Jeofails. Supposing that there had been but 23 returned, if 12 had tryed, it had been good enough. Judgment for the Plaintiff, Nisi. (124) Error. 1 Brant. 12. b. pl. 27.

Sabin *against* Sabin.

AN Ejectione firmæ brought in the City and County of Canterbury, and removed hither by Habeas Corpus; and because the Judges of Assize come not hither, a Procedendo was prayed: But by Twisden its not grantable, but the rest doubted. But because Bail was here put in, all the Court denied it, because thereby they were seised of the Cause. And by Wild, the Kings Serjeant, upon an Ejectment in the County, H. may declare on a Demise in any part of the County of Kent, and so try it at Maidstone; for the Venire Facias comes always from the place of the Demise; which Windham denied, the Body of the County being as another County from that of Canterbury. (175) Franchise. Procedendo.

Levit

Levit *against* Crane.

(176) Common.

A. may plead warranty made to A. and B. as to A. sole in Bar, without shewing death or assignment by the other.

IN Evidence to a Jury, the Issue directed out of the Chancery, was whether money was paid for the Mortgage of White Acre; if it were paid for White Acre and Black Acre its well, per Curiam, as if it were upon, whether a Common from Lady-day to Michaelmas, and the Jury find from Christmas to Michaelmas, and well by Twisden.

Contrà in a Count, 10 Ed. 3. 48. pl. 16. In a *Cessavit* Tenant must tender Arrears above two years; but H. shall recover Damages in *intrusion de Gard* for no longer time then the Count, 7 Ed. 3. 58. a. b. So *Certiorari* to remove a Record *coram* J. S. *et Socio suo*, for *Sociis suis*. 2 Leonard 112. pl. 149. 3 Cr. 79. pl. 42. In *Assumpsit*, the Jury find it for the Consideration alledged and another, its void. Demand of Lands in A. and B. is good, if the whole be in either Vill, 7 Ed. 3. 46. pl. 11. So Issue that A. ought not to repair, is found that A. and B. ought, is against A. 22 Ed. 3. 1. pl. 3. Formedon as Heir to *Baron & Feme* being only Heir to the *Baron*, good. 3 Ed. 3. 5. b. pl. 16. So Action by A. and B. as Executors against B. another not so named, yet good, 3 Ed. 3. 23. b. pl. 12. *Darrein seisin* pleaded in J. S. in a Writ of *Ayle*, if J. S. and T. were seised joyntly, its sufficient. 4 Ed. 3. 12. b. pl. 19. Alden.

Trippit *against* Reynalds. Ante.

(177) Assumpsit. Stiles 393. pl. 861.

H. Possest of a Term, and being in Treaty to assign it to B. B promises in consideration thereof to pay to the wife, which by Lindley for the Plaintiff is good enough, being advantage to the wife, M. 1654. Thomas *against* Geere, B. R. in consideration the Father would assign to A. A would pay to the daughters, who brought an Action, and adjudged good. And so in the Case of Sprat *against* Agar, M. 1658. and the same Term the like betwixt Fountain and his wife, there being a Relation betwixt them, it is sufficient to support the Action. And 2. although of right it belong to the husband to be Administrator to the wife, yet he may refuse, or for consideration, the Ordinary may grant to another. Tourner for the Defendant, It doth not appear the husband of Mary the Executrix is dead, and so her Administrator not entitled. 2. The wife is a meer Stranger, as in De la Bar and Golds Case, and not like the Case, Yelvert. 1. But the husband is intitled to all the Arrears in his life time. And 3. it appeareth not to whom the promise was made, as in H. 1651. Rot. Shun and Beelby, in consideration that H. would surrender, the Defendant promised to pay, and said not to whom, ruled naught; but per Curiam the promise shall go along with the interest and consideration, unless it be collateral, and vests no duty. And here by Allen for the Plaintiff, needs no promise to the wife; or if it had been made to the husband, yet if the duty accrue to the wife, she after his death may have the Action, and lay it as made

made to her self, for by Law it redoundeth to her: And by Windham this is a plain Bargain: But upon promise by A. to pay to C. for wares sold by B. B only shall have the Action, as hath been ruled, unless B. were in debt to C. And if it had appeared, that if the Father would assign to A. he would promise to pay to the Son, that vests not any interest in the Son, unless it appear in the Declaration that it was intended a Gift of the Father to the Son, and so in the Case at Bar. But by Allen for the Plaintiff, the payment is to be to the wife, her Executors and Administrators, and so the propriety appears hers, which the Court doubted. And by Twisden, this Rent is Collateral, as a promise to stand to an Award is not good, unless it appear to whom it was made; but when the consideration is of Marriage of his daughter, there the Son performs the promise, yet either may have it, French *against* Evans, In consideration of conveying Land to the Son, H. promised to pay, here the Son hath no remedy, because its Collateral. By Foster, the Declaration is upon a Communication betwixt the Plaintiff, Tenant to A. &c. and said not what Estate, which is ill, although the promise be to assign all his Term of years. Post.

2 Leonard 205. pl. 25.

Adjornatur.

Trisket *against* Hanby. Ante.

ALlen moved for Judgment, and conceived the Averment good enough, that he did forbear to sue the Defendant, and the others, till they could send to L. which after a Verdict the Court conceived it well enough. Foster absente.

(178) Assumpsit.

Judgment for the Plaintiff.

INdictment for eating and dressing Flesh on Friday, quasht, because it said not that he did inform any Magistrate that his Guests did eat, &c.

(179) Fish.

Palmer *against* Lady Chaworth, In Default Br. 52.

November 26.

(180) Baron & Feme. UPon a Judgment confeſt by her Husband alone of Debts contracted after the Marriage, as if they had been dum ſola, as Drakes Caſe, C. B. by which practice the wife and husband was taken in Execution; but notwithſtanding the Courſe of the Court, that the wife taken alone, ſhould remain till the husband comes in; the Court diſcharged her, and conceived ſuch Cuſtom unreaſonable.

Brown *againſt* Marten, Detinue Br. 2.

(181) Aſſumpſit. 3 Cr. 870. pl. 2. AN Indebitatus Aſſumpſit, The Defendant ſaith that the Money promiſed was but a Pledge for his Appearance, which amounts to the general Iſſue, for which Cauſe the Plaintiff demurred, and well.

Siderf. 69. pl. 6. The King *againſt* Field. Ante.

(182) Treaſon. HE was Indicted upon 13 Car. 2. cap. 1. §. 2. for preſervation of the Kings Perſon, upon that Clauſe which for ſeditious words gives the ſame pain as in Præmunire: And now by Bramſton, prayed to be bailed; which the Court would not have denied, but for good cauſe, viz. becauſe the times and perſon were dangerous. Poſt.

Tomlinſon *againſt* Hall in Debt, Fitzh. 183.

(183) Aſſumpſit. IN Action upon the Caſe, in conſideration the Plaintiff would accept a Leaſe, the Defendant promiſed to make him a Leaſe by ſuch a day: The Plaintiff ſaith that he was and is ready to accept any Demiſe in Scriptis, which by Baldwin is not good: But by Wild for the Plaintiff, the Averment is but Surpluſage, for the Defendant is bound to do it at his peril, which the Court agreed: But the Record was expreſs that he promiſed to Seal and Deliver a Leaſe, &c. which is intended in Scriptis. Judgment for the Plaintiff.

The

The King *against* Jones.

EIther party by Agreement may carry a Cause, where the King is party to Tryal, as in Perjury, &c. but cannot try it by proviso. 2 Leonard 110. pl. 144. (184) Trials. 14 Ed. 3. 16. 51. N. 11.

Neve *against* Nelson.

IT hath been doubted whether Priviledge be pleadable after Imparlance, by Twisden; but by Windham it cannot; contrà of Ancient Demean. Post. Adjornatur. (185) Priviledge. Stiles 197. pl. 446. Godbolt 286. pl. 412. 22 H. 6. 7.

The King *against* . . . . .

ITs said that A. Justice of the North R. in Y. went to view the Force in a place in Yorkshire, and said not that it was in the North Riding: For which Simpson prayed that the Indictment might be quasht. But per Curiam this is a Judgment, and must be Reverst by Error; though the Clerk affirmed Presidents were, it might be quasht. (186) Peace.

King *against* Alsop. Ante.

IN Action upon the Case upon Communication of an Indictment that had been against King for Perjury, the Defendant promised to pay, &c. if T. did not prove the Defendant in an Action of Conspiracy to be guilty, if the Plaintiff would give Taylor a Release, &c. Sharps Case, 1 Cr. 352. The Plaintiff saith, That although the Defendant was produced in a Suit betwixt the Plaintiff and D. and H. the said Taylor did not prove, &c. and sets not forth what the Issue was, which might be Collateral, or upon any other matter. 2. Its not said where the Trial was wherein T. was produced, for which Causes the Defendant demurred, Hub. 233. And 3. the Matter of Action is not sufficient, because it doth not appear that Hutton and Dow had indicted the Plaintiff before, and so it was but a bare promise, That if the Plaintiff, who had no Cause of Action, would bring an Action, the Defendant would prove or pay, &c. Adjornatur. (187) Assumpsit.

Prideaux *against* Sharſwell.

(188) Treſpaſs. 1 Leond. 314. pl. 438. Pleader 61. Noy. 107. 2 Brant. 204. pl. 487. 2 Brownl. 168. pl. 154. So 39. Ed. 3. 19. pl. 2. Act.

THe Plaintiff poſſeſſed of a Cloſe to which the Defendants is contiguous, and A. next his, B. next, his Cattle come out of the Defendants to the Plaintiffs to B, and ſo to other Land of the Plaintiffs again, which the Plaintiff ought to repair his, A. his, and B. his, this hath been adjudged, Binions Caſe 15. Car. by all the Judges, that the Stranger may have Treſpaſs, and ſo here may the Plaintiff for his Cloſe that is fartheſt off, 2 Jac. Cited by Windham contrary, and that the Plaintiff, where many Cloſes of his own are without any Strangers intermediate, becauſe all was his own Default he cannot puniſh ſuch Treſpaſs: but he agreed this Caſe as the reſt did. Adjornatur.

Elliſon *againſt* Elliſon. Ante.

(189) Error.

IN Debt, the Executors pleaded Non eſt factum, and a Capiatur againſt him, which Maynard plaid might be made Miſericordia, as it hath formerly been done, as well here as in C. B. Nelſons Caſe, as the rule in Boſvills being ſhewed did warrant, being quod eat inde ſine die, and Ireland *againſt* Key, M. 4. Car. B. R. In this very point, by Rule of Court, it was amended Miſericordia for Capiatur, 1 Cr. 474. Heling *againſt* the Mayor, &c. of London, cyted by Wild for the Defendant to the contrary, that this is not amendable; and the difference betwixt B. R. and C. B. taken, 3 Cr. 497. Harecote *againſt* Biſhop, and the difference betwixt Boſvills Caſe and this, is great in reſpect of the conſequence; this alters the nature of the Judgment. Baldwin for the Defendant: In Nelſons Caſe, there (as 2 Cr. Maſon *againſt* Foxes Caſe) was Reaſon to apply the Miſericordia to the Baron, and not to both; and the want of Eat inde ſine die the Judgment was not compleat without it, and therefore it was amended. Scrogs contrà, Smith *againſt* Smith, and Amendment Br. 27. 28. that the Prothonotaries Book is only of weight the ſame Term; but H. 15. Car. Mayor of London *againſt* Hill, Judgment to recover without ad Requiſitionem, was per Curiam reverſt for that Error notwithſtanding, 8 H. 6. c. 12. and he conceived this Court had as much power to amend as the C. B. eſpecially the form being conſtant and uſual, though the matter be ſubſtance. Adjornatur.

Latch. 86.

Web

Web *against* Martin. Ante.

JOnes for the Plaintiff, the promise is to do two things to, deliver Writings, and pay Money, and therefore being all to be done upon request, is intended of a request indeed only: But by Yarnly the Money is presently vested without request, contrary of the other, 3 Car. Hern *against* Tub, Co. Entr. 189. Burnels Case *against* Parkers, the Court agreed an Action of Detinue lay without request, but not an Action of the Case, where only Dammages are to be recovered: And here the Plea being applyed to both, being void for one, is naught, Remington *against* Remington; Action against an Executor, who promised upon shewing a Bond to pay Money on request, and Ruled by Rolls, that an Action lay not without request, which Twisden and Curia agreed; Distress is a demand for Rent, and so detinue for Money. Judgment for the Plaintiff. (190) Request. 1 Brant. 39. pl. 113.

Booth *against* Beard Ante.

IT was certified by the Clerks, that an Original filed after imparlance in C. B. and Judgment given, is good enough; and it shall be intended the suit was begun de novo, contrà where there never was but one Original that is so entred, and shew the Reason thereof; which the Court would not allow till conference with the Judges there. (191) Error.

Danby *against* Wintle. Ante.

STroud Jun. shewed Cause against affirming Judgment upon Error of a Judgment in C. B. the Record being of 12. that were returned in the Habeas Corpus and Distr. but the nomina Juratorum had only the names, omitting Jur. in some, which is the usual Addition to such as tryed the Cause; but per Curiam, if twelve really tryed the Cause, that is amendable by Examination of him that returned the Postea, Foster absent. (192) Error.

King

King *against* Williams.

November 27.

(193) Process. The Court refuse to grant an attachment against witnesses, though the King were party, as in Judgment of perjury, &c.

Bars *against* Desmond. Ante. In Baron & Feme Br. 1.

(194) Baron & Feme. POwis prayed she might be discharged, as in C. B. 2 Cr. 58. 11 H. 4. 71. 89. being but an Arrest on a mean process; and to say she is in Custodia, is no Reason, because when he comes in, he shall find Bail for himself and his Wife, and so the Plaintiff may declare against them both in Custodia; and per Curiam she was discharged, Nisi. Twisden said three Opinions have been; one that she should lye in Prison till the Husband come in, which is unreasonable. 2. That she ought to file a Common Bail if another will be bound for her, which may prevent a fraud in Arresting her at the beginning of a long Vacation: This the Court conceived reasonable; but at the Election of the Wife, whither she will or no. The third, that she ought to be discharged without Bail, which the Court also conceived reasonable and so awarded here.

The King *against* Read. Ante.

(195) Error. AS Wilson *against* Stubs, Hub. He is not the same person nor can have an Identitate nominis; and Gardiners Case 5. Co. this is admitted to be naught at Common Law, 1 Cr. 223. Zamhill *against* Stoler, and not helped by any Statute, although the party were not sworn; for if they were distinct persons, the Sheriff hath not well returned his nomina Juratorum, which must be according to the Distringas and Venire, which is his Warrant; and the Statute 18. Eliz. which only helps such Returns, is general, and extends to no Case where the King is party, 8 Ca. 163. Blackamores Case being not named, and Hub. 101. 1 Cr. 311. Noy 1657. Wildbores Case in a Quo Warranto, H. pleaded to part, and nothing to the rest, which was ruled a Discontinuance, in which Allen who now moved in Arrest of Judgment was Counsel. Windham, 14 Car. it was resolved, That if the Sheriff Returns 23. in defect of which Jury a Tales is awarded, that is not aided: And here he doubted whether this, being but by intendment only, shall

1 Brownl. 167. pl. 368.

ſhall be ſaid an abſolute Miſnomer, and therefore the Court will now intend him the right perſon. Twiſden doubted whether when 23. are Returned in Diſtringas, though the Venire Facias be 24. and 12. ſworn, it be not good at Common Law: And by Stat. 21 Jac. that remedies only Informations upon penal Laws are excepted, all others may be examined, as well as in an Action betwixt party and party, and ſo this being an Information at Common Law: But by Allen, that Statute is only where the parties be ſworn; but per Curiam, à Fortiori where he is not ſworn. But Twiſden doubted whether Sir Thomas Fanſhaw, Clerk of the Crown, Informer pro Domino Rege, be a Plaintiff within the Stat. 21 Jac. 2. He excepted to the Body of the Information, which chargeth the Defendant to ſwear that the Warrant of Attorney aforeſaid was ſealed and delivered as his Act and Deed; whereas the Action Original was a writing, which was affirmed to be a Warrant of Attorney. Poſt. Adjornatur.

Brathwhite *againſt* Lee.

YArnly moved in Arreſt of Judgment in an Action upon 5 Eliz. for exerciſing a Trade, &c. becauſe the Diſtringas, as 1 Cr. 336. was not in an Action tam pro Domino Rege quam pro ſeipſo, as the Original was, but only inter B. & L. generally. (196) Variance. Adjornatur.

DE

DE TERMINO Sancti Hillarii

13 & 14 *Car.* II. *B. R.* Die Jovis 23 Januarij, Anno 1661.

Foster *Chief Justice.*
Mallet,
Twisden,
Windham.

Moreton *against* Spencer.

THE Court refused a Certificate subscribed by the Secondaries of C. B. because the Prothonotaries are the immediate Officers for that purpose: And by Twisden, Certiorari to the Deputy of the Custos Brevium was refused by Rolls, but after granted for good Cause; but he never knew any directed to the Court, certified by the Secondaries, not to the Bishop done by the Commissary. 2. For the Matter, This Court will scarcely grant any Prohibition (however grantable) if once denied in C. B. before, especially after long Procedings and Appeal hanging, which was the reason that (it being in discretion of the Court) was denied in C. B. But by Allen for the Defendant, A Prohibition is not ex gratia Curiæ, but grantable ex debito Justiciæ; and if they proceed, H. may inform against them: But by Windham, though the hanging in Appeal will not alter the Cause, yet if they have Conusance of the Principal, any incident property there arising (and of such nature might this Cause be originally) may be tryed by them.

(1) Officer. Stiles 203. pl. 458.

Stiles 87. pl. 180.

them. Twisden conceived (and Foster doubted) that its not Honorary, as a grave Opinion hath been. Mallet agreed the like. Post. Adjornatur.

Bendison *against* Sir John Lenthall.

(2) Escape. Stiles 465. pl. 104. POwis for the Plaintiff, prayed to have the Defendant, who is Marshal of the Marshalsey, in Execution: And by Foster and Windham, if he will not pay his Debt, the Court will appoint another Marshal in his stead, and so commit him, else it would be an Escape of all the Prisoners, per Curiam.

Tridaham *against* Top.

(3) Admiralty. JOnes moved for Prohibition to the Admiralty, the Libel being in nature of a Trespass, for taking away Money and Cloth, suggesting it on the high Sea. Granted, Nisi.

Ellison *against* Ellison. Ante.

(4) Error. MAynard prayed the Opinion of the Court in the Entry of Capiatur for a Misericordia; Twisden agreed, Keyes and Irelands Case; but being in Trespass of Assault and Battery, upon Not guilty found against the Defendant, a Judgment in Misericordia for a Capiatur, but that was only upon the Postea, by which the other was used to be amended; and of this nature was the eat inde sine die; and this was by the omission of the Clerks about 4 Car. when the Secondary could not enter it up by the numerous company of Causes, and so entred only quod Recuperet, and assest the Costs, but the other he left to the Clerks, which mistake. But by Windham, (who would be as near to an Amendment as possible) this is the very Standard of all, and more stronger then that Case of a Misericordia against the wife, made against husband and wife, 1 Cr. But the Case of Everard and Boswill in Debt on 2 Ed. 6. on Not guilty pleaded, part was found for the Plaintiff, and part against him, and no eat inde sine die for the Defendant: but Twisden doubted upon the Books, Beechers Case 59. & Blackamores Case, & Hut. All take this pro confesso, but not much mischief can ensue hereon, no more then in the Common Pleas, where they amend by their paper Rules (not properly Dockets) which the Prothonotaries make among themselves. Post. Adjornatur.

(1)

A Justice of Peace prayed a Supplicavit against H. that was so unruly that the Justices in Sessions could not rule him; and the Court conceived, that to go armed is good cause to bind him to good behaviour. (5) Peace.

If the husband confess an Action for a Debt against Baron & Feme dum sola, the wife may be baild; but not so where both are sued and taken by mean Process, she cannot be delivered till the Return of the Writ or Habeas Corpus, if no Prosecution be within three Terms, by Twisden, which the Court agreed. (6) Baron & Feme.

Child *against* North and Timberley.

Lindley moved to quash an Indictment of Conspiracy to charge H. with having Carnal Knowledge of a woman, and did so; and that the Child she went with was H's, which he said was matter not within the Conusance of this Court. But per Curiam this is likely to be a charge and loss to H. and therefore the Indictment is well layed; contrà if it were only for getting J. S. with Child, especially being after Verdict against the Defendants, though there were no Child born. And by Foster its no ground, that because the Court have no Conusance of the Principal, therefore they may not punish the Conspiracy; for if it be to do an act unlawful, the very Conspiracy is a Crime, & præsentatum extitit, per Windham & Curiam, is (and hath been ruled heretofore) good enough. (7) Conspiracy.

Judgment for the Plaintiff, Nisi.

Hodges *against* Hodges in Error, Br. 90.

January 24.

Powis prayed Amendment here of a Variance betwixt Ven. Fac. & Hab. Corpora, being after Diminution alledged by the Plaintiff in the Writ of Error here, and amended below after: But per Curiam, whatever they may amend below in C.B. we may amend here after the Record removed, and not they properly; though by Custom of the Court they do so, yet how justly, Twisden doubted; and having not the Rule of the C.B. he came too soon to move this motion: And by Windham, if any Amendment, its better to be here by Authority of the Court by that below, and not to go thither to amend. (8) Amendment.

And the Court ordered the Clerk of the Treasury to bring in the Roll into the Court for that purpose.

Debt Br. 22. Prideaux *against* Weller. Ante.

(9) Limitation. Bar.

IN false Imprisonment, Bear for the Plaintiff agreed, that being laid (10 Oct. 57.) for 18 Months, to which the Defendant pleaded 21 Jac. of Limitations, alledging the Session to end 29 May, and that the Assault and Imprisonment, only named in the Writ, was done (29 Oct. 55.) and a Bill exhibited 12 Car. 2. which is not within one of the Sessions, or four years of the cause of Action, the Count being of Assault, Battery, and Imprisonment. The Plaintiff confesseth the Trespass to be the 29 Oct. 55. from which time till 29 May, 1660. no Court was open, where the Subjects might have Justice, by reason certain Rebels had usurped till 29 May, the Kings Return: The Defendant confesseth the Replication, but pleads the Act of general Pardon, 13 Car. 2. (not shewing he is no person excepted:) Also he pleads the Act of Confirmation of Judicial Proceedings specially, &c. and that the C. B. 29 Oct. 1656. to 29 May, 1660. were open, & hoc paratus est verificare, not saying prout per Record. The Plaintiff demurs, and sheweth for cause that the Defendants Plea is a Departure. 1. The Act pleaded in the Bar is not good, because he saith nothing of the Battery, wounding, and ill intreating, and every one of them is a special Trespass, which the Statute names particularly, and no Vi & Armis, whereby the Fine is due to the King for every of them, Dyer 65. and the Rent abridged, cannot be the same as that whereon H. Counted. So Dyer 36. when one answers not Wendition, though he answers all the rest of the Count, its no Plea: And so in the Case 6 Ed. 6. of Cliffords, Error, one must not answer Non Ejecit generally to Ejectment, and carrying away of Goods; and so the Statute being only pleaded as to the Assault, its ill: But by Wild for the Defendant, one never pleads to the Vi & Armis, where he begins with the Statute of Limitation, which the Court agreed: And as to the other, the Record was quod transgressio insultus & imprisonamenti. Bear excepted to the day, which is impossible, being but of one day, 1 Cr. 370. Thornton, & 414. Owen *against* Long, and this for 18 Months, Read *against* Price, 1 Cr. and the 18 Months are within the four years given by Statute, and so repugnant to the Plea. 3. The Imprisonment was till the Defendant paid 100 l. to a Stranger, which Extortion is a new Trespass not before mentioned, but distinct,

He ought to have named them particularly, as 33 H. 6. 1. b. pl. 3. per Danby.

(8)

Cramp

Cramp *against* How, Tr. 11 Car. Rot. 308. B.R. in Treſpaſs of Aſſault, Battery, and Impriſonment, till the Defendant paid a Fine. The Defendant juſtifies the Impriſonment by a Warrant, whereby he took the Defendant in Execution till he paid, &c. and as to the reſt, pleaded Not guilty; and not anſwering to the Fine, which was held a diſtinct Treſpaſs, not depending on the Execution, it had been ill, but that it was held to be within the Not guilty pleaded to all the reſt. And here the Plaintiff procuring, the Defendant is Treſpaſſer, as 27 Aſſ. 59. commander of a Treſpaſs is a Treſpaſſer. 4. The Replication ſheweth that it was impoſſible for him to commence his Action before he did, and ſo not within the purview of the Statutes pleaded in Bar, Weſt. 2. c. 49. as where Plea abates for falſe Latin, one ſhall have the view, becauſe its apparent to the Court he had it not before, Pl. Com. Stradling *againſt* Morgan, 25 Ed. 3. 16. and ſo Marlbridge 21. for neceſſity the Sheriff may enter a Plaint before himſelf, and after Returns it to the County Court, that ſo the Cattle may not periſh; and for this reaſon of impoſſibility, Uſes in Contingency ſhall not be executed; and by reaſon of this diſability, the Statute of Fines hath excepted Feme Coverts, Infants, &c. And here is an apparent diſability, that the Plaintiff could not proſecute, there being no Courts of the King, and there was a diſability in the perſon, who could not ſue without taking an Oath of Engagement; and had he ſued all the Proceſs had been Coram non Judice, as all had been if the Act of Judicial Proceedings had not been made, Pl. Com. Chapman *againſt* Dalton, Lex non cogit ad inutilia; ſo Butlers Caſe, when men are diſabled to render benefit, the other need not perform the Condition; likewiſe here were none of the Juſtices of the King ſitting, Dyer 270. and therefore proceedings could not be good, 2 Cr. 230. Points Caſe. And the Rejoynder pleads the Courts of the C. B. were open, not ſaying the Chancery was open, without which the C. B. cannot proceed; and whether they ſit or no, cannot be tried per Pais, but by the Records: And by Foſter, the Rule being Judgment, Niſi better cauſe, &c. the Counſel cannot argue de novo, but ought ſtrictly to obſerve the Rules of Court. Wild for the Defendant, The Plea concludes with a Traverſe abſque hoc, that he was guilty of the Aſſault, Battery, and Impriſonment, prout, &c. which is well enough, being but inducement; elſe by Twiſden he muſt plead Not guilty. Hereby alſo all that is in the Plaint is taken in, and had been by the word Treſpaſs only, and being modo & forma, it goeth to the whole 18 Months; and if it be falſe in part, the Plaintiff ſhall recover pro tanto,

and

and the payment of the Money is but an aggravation of the Offence, and depending on it; and the Replication is ill, the Engagement being not pleaded, and the Action being per Billam, and he saying he could not have any Writ, which is naught; and so the Bar being good, and the Replication naught, the Defendant ought to have Judgment. Windham, The Trespass can be pleaded but at one day, and the Aggravation from it Continuando, &c. which if any part be within the Statute, the Plaintiff must shew it, and all is taken in by the Travers, & per Curiam, had those persons not been excepted, they had been bound, as all else had, as Casus omissus. Judgment for the Defendant: And by Windham, the Bar is better pleaded then if it had recited particulars; but he conceived the recital, that no Writ could be had, was sufficient, and that Bill is but a Special Priviledge, but the Chancery being shut, its tempus belli: Also men might have sued heretofore without taking the Engagement, though his Suit would have been staid; and those proceedings are by these Acts owned and aided.

In Contract. Br. 15. Manby *against* Scott. Ante.

January 25.

(10) Baron & Feme. IN the Exchequer Chamber, all the Judges of England being present, Jones for the Plaintiff, That the Husband is chargable, because what ever she had, or can acquire, must be to his benefit; and so nothing more reasonable, then that the Husband should allow his Wife, in his Life time, as well as after his death, they being but one person. And 43 Eliz. 2. doth provide, that impotent Children shall be kept by Parents, and è contrà; but no provision for this Case, wherefore it was intended not to be questioned: And the Spiritual Court hath no power to give any remedy, Registr. 34. 38. or at least not sufficient, though Marriage doth appertain to the Spiritual Court; and de Catallis, as necessary thereto: But where the Marriage is not in question, 31 Ed. 3. Attachment upon Prohibition, F. 8. they cannot hold Plea de Catallis, as the principal Prohibition F. 21. doth also imply this difference, when they have adjudged a Divorce, they may allow maintenance, 1 Cr. 220. but not Originally upon suit for Alimony, Waters Case 21 Car. in the House of Lords, referred to the Judges, Bacon, Rolls, &c. who allowed, That the Wife might charge the Husband, as here alledged; (but the Judges disallowed that Case, because of the irregularity of the times, and they no rightful Judges:) And that the remedy

by in the Spiritual Court is not sufficient, is evident, in that the Wife can have nothing to enable her to sue; to this end was the Quarentine allowed to them, Magna Charta 7. 1 Inst. 32. and the Common Law would be deficient, if no provision be to maintain her in the mean time; and all the Spiritual Court can do, is but to Excommunicate; and if he will obstinately lye in Prison, they have no Jurisdiction over the Estate to compel it. 2. All the Books agreed, That the Wife cannot charge the Husband, without assent precedent or Subsequent, expressed or implyed, but those Cases are not understood of Necessaries, in which Cases persons otherwise unable are made able; As Infant, upon a promise in Law, may plead nil debet, contrà if for Necessaries, there his contract shall bind. And a Feme Covert, if the Husband be Exiled, may contract, rather then be without a maintenance and subsistance, 2 H. 4. 7. and so of a Moin in the vacancy of an Abbye, 13 H. 8. 3. and the inconvenience pretended; if the Wife may charge the Husband, this is not greater than that will be on the contrary; for women will be more tempted by want of maintenance then by abundance, 11 H. 6. 20. by Marten is express in this point; and of latter times, the Opinion and Practice hath been this way wholly 22 Car. Rot. 1151. Tr. B. R. Dent *against* Scot, in this very point, which the Court agreed; though for want of an averment in pleading, the Judgment was not given, and Trespass or Trover lyeth against the Baron & Feme for her Default or Conversion, and the Count shall be ad usum of the Husband: 2. The finding she lived from him, or that he prohibited, will be little material; supposing the former true: And at Common Law, although the Wife Elope, 2 Inst. 435. Westm. 2. 34. she should have had her Dower, and here being no Cause, the best shall be intended, that she went away for good Cause; Baldwin for the Defendant, That the Husband is not chargeable at the Common Law, nor was there ever such an Action brought before, Debt Fitz. 163. 20. H. 6. 22. by Newton, F. N. B. 62. 21 H. 7. 40. per Fineux F. N. B. 120. G. Dy. 234. Points Case. M. 5 Car. Bill *against* Lake C. B. Hull 106. all which Books shew the Law to have been to the contrary, that she cannot charge him: And the Opinion of Marten sheweth not by what course or Action she shall charge him, and this was but obiter, not the principal point. 2. The Law in no Case doth charge the Husband without his consent, to which the will of the Wife is subject, and so all contracts by her, by all Laws what ever, is a nullity; but an Infants contract is only voidable, she cannot confer a benefit on him, à fortiori, 27 H. 8. 25.

not

not a charge without his consent, 2 Cr. 917. A Feme sole leasing, rendring, rent payment to her after coverture, without notice of the marriage, is nul; and to allow her a will against her Husband is to erect a double Judicature in one Family, and very inconvenient, and an occasion to make them unchast, 1 Co. 139. which is the Reason of the not maintaining contingent uses, and this is a necessity of her own making by departure from her Husband, which the Law will not favor; and though it may be an excuse against, yet it shall never introduce a charge upon a third person; and there is a proper remedy (if any) in the Ecclesiastick Court, by the Ordinary, taken notice of by the Judges here, and always allowed by the King; and all the Prohibitions are, that they hold no pleas except de Causis Matrim. & testamen. Old Mag. Chart. 78. which only appertained to them, all the rest to the Crown, Linwoods Case de foro competenti; and till 13 Ed. 1. Circumspecte agatis were, excepting only those two sorts, and that Statute introduced the rest, which now are in them and Alimony, Divorce, and Promises of Portions, and all other Accessories of Marriage, as well appertain unto them, as the principal, 14 Ed. 46. F. N. B. 44. Dr. & St. 16. and for these Reasons, Legacies, Bastardy, and Legitimation, which are Accessaries, Dr. Cozens Apology; for this Reason concerns, Divorces, though for the dissolution of the Marriage, do belong to the Ordinary: and Westm. 2 C. 34. doth imply, that the Ordinary may compel the Husband to receive his Wife, and to separate them for his severity, and to enquire who of them is pars peccans, and the Temporal Courts never medled, but in aid of the Spiritual, Rot. Cl. 7. H. 3. Membr. 7. Emie de Pinckney, she, when he is excommunicated, may have a Writ de Estoverio Capiendo: and a little after this, the next Term. Membr. 14. it appears that the Sheriff had seised the Land for her maintenance, according to the like Case the year after, 8 H. 3. Memb. 19. Frechingtons Case, Donec maritus ipsam lege matrimonali tractaret, and conformed to the Award of the Spiritual Court, or put in a Cautione admittenda; and though this Course hath been neglected, and not mentioned in Articuli Cleri, Circumspecte agatis, it is not material, because this was at Common Law, and those Statutes introductive of new Laws: And upon this Reason, 2 Cr. 364. Hiats Case, the Court denyed a Prohibition, because the Ordinary had power Mich. 1 Car. Cr. Greens Case 16. and the Spiritual Court, when Constat, that there is a Marriage, do allow maintenance presently ante finem litis; And a Prohibition was in Drakes Case, because the High Courts had

had no power, but only the Ordinary. 2. Admitting for all this, that the Husband is Chargeable, yet not against this Prohibition; no more than if she had lived with him; for without his fault or assent, he cannot be charged. Bridgman, If none will trust the Wife, what remedy? Jones, No more then if none would trust the Husband: Hyde conceived the Opinion of Marten not valued to this purpose: And if the Husband might have waged his Law, this remedy had been nothing worth, and de debitis & Catallis that concerned not Matrimony, they have no Jurisdiction in Special Court; nor for Alimony, as such, no remedy were in Special Court originally, nor unless she be pars læsa, at all; but when constat de Matrimonio, if no default be, she shall be allowed it. Hales agreed the proper remedy to be by Excom. Cap. Adjornatur.

The King *against* Field Ante.
January 27.

Field, a Parson in Lincoln, was indicted on a Clause of the Statute 13 Car. 2. c. 1. for preservation of the Kings Person, for preaching, that the Government of the Church of England was Popish, Superstitious, and Will-worship; and that God would say to such, as observed it, the last day, Who required this at your hands; and at the same time, that another day would come of their delivery, whereby he encurr'd a Præmunire, 11 Aug 13. Car. Mr. Attorny Enlarged upon the Charge, That Sedition was either Armata, in open Hostility, or rogata, which was the worse of the two, being secret, and enflaming more than the other; to prevent which this Act was made, and because this was the first offence of this kind, he desired the Preamble and this Clause of the Act might be read, Et ei conceditur, which was, that if any said the King was an Heretick, or Papist; or any thing to the disturbance of the Government now established, &c This by Warrant of the Council came to Tryal here, (which was read) and Mr. Attorney conceived, that if the words were spoken before the time in the Indictment, yet if they were spoke after 24 June it is sufficient, which the Court agreed. Allen for the Defendant, excepted after Evidence against the Order, which was Grounded on a Petition of the Inhabitants, and recited, that the Attorny should indict for Treasonable or Seditious Practices, not naming any point of the Act particularly, there being divers Branches of the Statute. Glyn, Ubi lex non distinguit, Non est distinguendum; and the Law that requires this Order, doth not re-

(11) Religion.

quire particulars, which the Court agréed; that notice of the Crime, so it be any within the Statute, is needless in the Order; but the Attorney may prosecute, as he thinks fit, were it only by personal Parol, Command. Moreton excepted to the Indictment, that it was Voluntaria adoratio, Anglicè Will-worship, which the Court over-ruled as immaterial: And by Allen, the words must be malicious and advised; which by Twisden, being by preaching, it is so intended; also the Court refused to examine Witnesses, whether they were Indicted at the Suit of the Defendant for forcible Entry, but they must shew the Indictment: But by Allen, they may be asked at large, whether there were no Suits or Differences betwixt them. Post.

Raymond *against* Matthews in Debt, Br. 43.

January 28.

(12) Amendmēnt. 3 Cr. 455. pl. 2. JOnes for the Plaintiff, moved for Repleder in Action of Covenant to perform Articles, and payment of Money. The Defendant pleaded payment of the Money after the day, which the Plaintiff accepted, which being not pleaded by way of Accord and Satisfaction of the Covenant, wherein Damages also is recoverable, is ill, 3 Cr. Nichols 455. But this Issue being insufficient, and found for the Defendant, its not aided by the Statute of Jeofails. Goldsb. 106. pl. 11. And by Twisden, payment pleaded to a single Bill, if found for the Plaintiff, he shall have Judgment; if for the Defendant, there shall be a Repleder. Adjornatur.

Barrow *against* Hewit.

(13) Trover. IN an Action of Trover for a Cow, after Argument, Miller for the Defendant prayed the privilege of a Parliament man, which the Court would not allow on suggestion without a Writ.

Dakers

Dakers *against* Whiteacre.

January 29.

(14) Error.

After the General Error assigned by the Plaintiff, he may assign Diminution, but else Diminution cannot be pleaded till Error assigned in some particular: Also by the course of the Court Errors cannot be entred till the Certiorari of Diminution retorned, and the Rules to plead are out. Post.

(15) Amendment.

NOta. If a Record after removal into this Court for Error be amended, it must be done here by the Officer of that Court from which the Record cometh, by Mern Secondary.

Holland *against* Blest.

(16) Covenant.

IN an Action of Covenant upon Bargain and Sale, That the Defendant had a pure and good Estate of Inheritance, and a power to alien; The breach was, that he had no pure and good Estate, &c. whereto the Defendant demurred, and none attending, it being a Concilium, Judgment for the Plaintiff, Nisi.

Hawkesworth *against* Jordan.

(17) Trover.

IN Trover for fifteen Tun of Fur-stake-wood, the Defendant pleads, that before the Trover J. S. was seised and indebted to the Defendant, who by Custom of Bristow attached it in the hands of J. S. The Plaintiff said, That he was possest at the time of the Plaint, and ever after, absque hoc, that J. S. was ever possest: To which the Defendant demurred, because the Replication was at large.

Judgment for the Plaintiff, Nisi.

Bill *against* Neale. Siderf. 67. pl. 42.

(18) Slander. 2 Cr. 196. pl. 22. Moor 247. pl. 389. 3 Cr. 589. pl. 25.

OF one, That he will be like Mr. Major Bill, who is a Fool, and an Ass, a Coxcomb, and a Buffle-headed Justice of Peace. Windham doubted whether any Action lay, H. 2 Jac. Hollis *against* Bristow, being no Scandal to his Profession. Wild for the Plaintiff, No greater Scandal can be to a Justice, then to call him Fool. Adjornatur.

Morten *against* Spencer. Ante.

(19) Prohibition. Wild for the Plaintiff, that the Court is not bound de Jure to grant a Prohibition, upon a bare surmise after Sentence against the Libel, 12 Co. 77. (Winch. 8. Jones Case Hub. 79.) this Prohibition is brought by the Defendant to his own Appeal five years after Sentence. Stroud Senior, for the Defendant, the Libel it self is of a property, (Hub. 10. Bridgmans Case) not mentioned to be done on the Sea, and so they can have no Conusance; and to have a Prohibition after Sentence is usual, and the Court ought to grant it de Jure, as in 2 Cr. 252. Worts *against* Blifton, because it is a thing Coram non Judice. Allen ad Idem, That it ought to be granted it is evident, because nothing appears proper for their Jurisdiction, else a Suggestion contrary to the Libel should not be received so long after without Scruple; but this Court doth regulate all inferiors when ever complaint is made, and the Defendant is a proper person to come in, because he is a Creditor, and comes in for his own interest, and so the question was whether the property were in Harrison or the Defendant Spencer; and so the Original Cause of Action is in nature of a foreign Attachment, or else he might have Trover. Powis for the Plaintiff, All is confirmed by the Act of Judicial proceedings, being Conusans of such Bills of lading was given heretofore to them by a former Act of Lords and Commons which upon perusal reached not this Case: Twisden, I cannot admit, that Prohibitions are prudential, but if they do incroach, this Court must prohibit. But if one will lay a Transitory Action on the Sea, and the other admit it, then the party against whom the Sentence is, hath only remedy on the Statute. But when one against whom Sentence is given, will appeal after Execution made, and the Money delivered, the Court think fitting that he should reimburse the Money before (Spencer) he have a Prohibition. And by Windham, things done beyond Sea are of a mixt Jurisdiction, but do not properly at Common Law belong to this Court, 48 Ed. 3. 3. 4 Inst. nor to the Admiralty, but to the Court of the Constable and Marshal; but 4 H 4. is that they shall fight in Debt for such a thing; but this Court hath given relief of late for necessity, suggesting the fact done in England; and the thing being not properly invasive of the Com. Law, he conceived it in discretion of the Court, to which Mallet agreed, but Foster denied it to be meerly of discretion, though much of discretion be in them, to keep them from doing

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any oppreſſion, for the party grieved hath another remedy by Action upon the Statute 2 H. 4. to which when any ſeek delay by Prohibition, the Court will leave them: Alſo the Defendant being not wronged in his property, which is tryable in Trover, he conceived he ſhould have no Prohibition, (which was upon conference alſo, with the C. B.) unleſs he would redeliver the Money to Serjeant Moreton, parties may conſent Verdict ſhall be final, or that no Writ of Error be brought, but not that H. ſhall not ſue by Statute; and by three Judges, whoſe Opinion was, that Spencer ſhould have a Prohibition, becauſe Moreton refuſed to bring the Money into Court, and try the property. But after Moreton agreed.

The King *againſt* Read. Ante.

KEeling for the King. There are three perjuries aſſigned in the Warrant of Attorney, and that he owed not the Money and that J.S. was not a wit-neſs produced, and if any of them be well aſſigned it is well, and therefore the Information being of a Warrant predict. pro ducentis (omitting libris) is well enough. Alſo the Communication was of a writing, which H. affirmeth to be a Warrant of Attorny; and the Iſſue by the Defendant, is, that it was a Warrant of Attorney, and ſo ſworn by him to be ſealed, and the Plaintiff cannot call it a Warrant of Attorney in the Information. Windham abſente, Adjornatur: But the Court conceived it well enough, the Courſe of Information by a Memorandum quod Recordatur, &c. was ſince 5 Eliz. and begun by Twiſden, upon Cuſtom to bring in the Iſſue to tranſcribe it, by which referr'd to a Record of another Term, and recited a Bill to be filed (which was uſually never filed) and falſities crept in hereby, which was the reaſon of introducing this courſe lately. But all the Judges doubted of the recital of the Irrotulatur. Adjornatur. 214. pl. 22. (20) Perjury.

Cranmer *againſt* Andrews. Baron & Feme.

January 31.

H. was Arreſted in London, and there charged with a Latitat againſt H. and his Wife, and ſo turned over to the Marſhalſey, and proceſs againſt them as in Cuſtody, but by Wild, for the Feme, that Judgment cannot be againſt her, ſhe never having been Arreſted, nor the Husband having not appeared by Attorney; which if he had, he muſt have filed a Common Bail for him and her, but not ſo where he enters into (21) In Default Br. 52. Stiles. 226. pl. 511. Goldsb. 127. pl. 19. 40 Ed. 3. 34. b pl. 1.

to Custody. But by Hern Secondary, the Course in both Cases is, that the Husband though only Arrested, must put in Bail for both, though she were never Arrested. Twisden, Elsey *against* Mandit an Attorney and his Wife, who was forced to appear, though he could not have privilege for both.

Adjornatur.

The King *against* Read. Ante 213. pl. 20.

(22) Perjury. UPon a Communication betwixt Dunne and Dawson, of a Writing, which Dunne affirmed to be a Warrant of Attorney, whereon (if he proved it so) Dawson would pay, &c. And on Issue thereon, the Defendant R. swore that he sealed the said Warrant of Attorney, and that R. Rumley, a witness to the Warrant of Attorney, shewed a wrong person to the Plaintiff Dunne, &c. Keeling moved for Judgment after Verdict against the Defendant; as to the Recordatur, he left it to what Exposition the Court would make, because its dubious. 2. The Habeas Corpus is R. D. Junior, of H. whereas he was only named R. D. in the other Process, but 24. in all; and Additions are by 1 H. 5. 5. given, and so not necessary in Returns of the Sheriff, as the Case 3 H. 6. 16. which because Process of Utlary lay not, it was ruled the Addition was well enough, 44 Ed. 3. 34. because needless. 3. Its said that Dawson sealed and delivered the Warrant of Attorney aforesaid. And 4. That it was for 220. not saying what, which being but the cause and ground of sealing the Warrant, and is several in it self. Allen for the Defendant, The Recordatur is but new, and therefore making no distinction, but only (& quod) which may be intended either way; but Indictments shall not be so aided. 2. As to the Return of the Habeas Corpus, its but of 23, and so not holpen by the Statute, being in an Information, no more than in a Quo Warranto, and here this person cannot be intended the same, as when one Writ relates to another that may be supplyed with Averment, but not so in a Return, where no Averment can be, being at large, and so its insufficient at Common Law. 3. The Oath is relative to that which is not (viz. the Warrant of Attorney) but as to the pro 200 he waived it. Winnington for the Defendant, as to the Recordatur, cited Wimbish *against* Talbois in Pl. Com. That the Plaintiff must positively affirm the Record, and a Recital is not sufficient, as Browning *against* Bestons Case. And as to the second, he cited Gregories Case, 5 Co. And by Windham, Blackmores Case is express, That an Information at Common Law is within the Statute of

Jeofails,

Jeofails, contrà if upon any Penal Statute. But by Allen, the body of the Statute is of Suits betwixt party and party, 32 H. 8. which yet extends not to Returns. Also by Keeling, In all Indictments, when new matter is offered, it begins only & quod, and not dat Curiæ intelligi. Windham, Judgment, notwithstanding the Exceptions, ought to be for the King. And 1. The Recordatur runs not through all, but is guided by the subject matter, which is only till the Issue joyned, not what the witness said, which is only matter of Fact not entred, and so shall not be intended to avoid a Perjury found. 2. For the Variance of the Venire Facias and Habeas Corpus, I shall not intend it to be another, but a farther ascertaining of the same person, 24 being Return'd; and had there been no such, yet it had been good; and so if any real Variance had been in the name, if that person were never sworn, which is parcel of all those Cases that are cited to this purpose; and he said he had seen a Judgment in the Exchequer with this difference. As to the third point, That Informations at Common Law were within the Statute, but not so of such as are on Penal or Popular Actions, which may be veratious: And the Stat. 18 Eliz. is in any Action or Suit, (not only betwixt party and party, but generally) and this Information is a Suit grounded betwixt the Coroner and the party. And 4. its better being pro 220 (without libris) then with it, the Substantive only giving the signification, and so warrant. prædict. is full, and not contraried by the other Twisden ad idem. Though he generally disliked the Recordatur, as not being in old Keelings time, but since; and is but an Argument that there was such a thing, and no positive Crime charged; yet as this case is, its positive, because only the Suit is Recorded; but the usual way was, dat Curiæ hic intelligi, that at another time isto eodem Term. such a one placitasset, which was supplyed by the former Records; and so this Allegation is, that the Defendant was produced as a witness in causa prædicta, which is a sufficient Averment of it self; and as to the Variance, its well enough, and 24 Return'd, and good at Common Law: And 39 H. 6. 46. by Prisot, the Addition of Junior doth but ascertain that which before might be intended to either, and tried by Examination of the Sheriff, if he had for this Reason been challenged, and might have affirmed him to be the person intended. Also 3. this is not within the 32 H. 8. or 21 Jac. which are pursuant one of another, but its within the Equity of 8 H. 6. which is generally of Amendments in all Cases, except Appeals and Indictments, &c. And 18 Eliz. hath a Proviso, That this shall not extend

Hitch. 42. b. pl. 138.

1 Brant. 314. b. pl. 776.

1 Brant. 379. b. pl. 967. 2 Cr. 414. pl. 2.

extend to popular Actions, but Informations, as an Appeal of Maihem is out of the Statute, it is not an Action, because no Queritur, nor any suit, because no producit Sectam; but he conceived it might be within the word Demand, because the Informer petit advisamentum of the Court; but he waived these, and relyed on that, that he was not sworn. And for the Warrant of Attorney nothing could have been said better: Mallet, ad Idem; being after a Verdict, and so Foster in omnibus, Judgment for the King. Post.

(23) Appearance.

NOta, pro Reg. per Curiam, None may move to quash an Indictment for Crime, before or after a Verdict, unless his Client, who stands Indicted, be present in Court.

..... *against* Wich.

(24) Games. *Contrà per Brown* and playing is not Prohibited by C. Law, as 11. Co. 87. b. nor is it cause to return a Clerk Criminous. Dyer 254. b. pl. 2. It lyeth for mony won on wager del upshot at Butts. Moor 549. pl. 736.

AN Action upon the Case per Curiam, will not lye for money won at Dice, it being no consideration for an Assumpsit; yet H. losing it when Drunk, hath no remedy to avoid Bond or Warrant of Attorny to confess a Judgment, for such Money, by motion, as in this Case, or otherways, unless some practise and deceit appear.

Drury *against* Herkford.

(25) 3 Cr. 891. pl. 8. Records.

WHen the Record is part before one, and part before another Judge in C. B. the Certiorari must be special, reciting so much before A, &c. And so much before B, &c. And being generally of a Record before R. Foster, all the process (except the Judgment) being before O. St. John, the Court doubted that it is abated.

In Denizen. Br. 7. Collingwood *against* Pace Ante.

February 1.

(26) Alien.

IN the Exchequer Chamber in Ejectment; Allen for the Plaintiff, R. hath Issue four Sons, Aliens, one hath Issue after the Union, then another is naturalized, and deviseth to N. and his Heir, and the Heirs of such Heir, &c. The first question is, whether the Issue of an Alien may inherit to his Brother, both the Brother and his Father afterwards being naturalized; He conceived that he might: And that which is the Foundation of discents in Nature is love,

as

as Grotius de Jure Belli, l. 2. c. 7. §. 4, 5, & 9. and him, whom one is presumed to love most, he shall take. And this is regulated by particular Customs of Nations and Places, whence comes the distinction of Sanguis Naturalis, which is the same among all, or Civil, which is either by Birth or Donation, as Denization by Patent or Naturalization; and to be Inheritable is a Term of Relation, which requireth a person from whom objectivè, and by whom subjectivè, the Copula of which is the Blood, which is either hindred per defectum, which only Incapacitates, or per delictum, which destroys the Inheritance it self; and this is a necessary Introduction to the main Question. R. having Issue three Daughters, aliens, and N. the second Son had Issue P. Angloy, neither of which can hinder the discent to John the Son, 42 Ed. 3. 2. of George the youngest Son, 22 H. 6. 38. P. 31 Ed. 3. tit. Cosinage 5. from John Earl of Holderness, 1 Inst. 8. both Dr. & St. 13. Denizen Br. 7. being under that like reason; and this point hath been already admitted, and therefore he only takes it in transitu to the main point, Whether J. the Son of G. the Brother of John Earl of Holderness (both being naturalized) may inherit to J. Earl of Holderness. The only objection hath been, That by the Act of Parliament the Brothers are but in the same Case, as if Subjects born, in which Case 1 Inst. 8. they could not inherit to each other, R. the Father being an Alien: And as to this its answered, 1. Though the Act seem relativè, and here to terminate in making them Subjects, yet is it express, that they may resort to their Pedigrée to convey their Discents, which had else been idle: But admitting they are only as Subjects, he conceived them inheritable, which he proved by answering Objections, because as this Case is, few ancient proofs affirmative can be had. 1. He denied the Rule, That where the Sons cannot inherit the Father, they shall not inherit each other, unless when the Son conveys by the Father, 1 Inst. 84. its admitted that no Dower shall be given to a Feme Alien, or who marrieth an Alien, 7 Co. 25. Calvins Case 3 H. 6. 55. 1 Inst. 31. And in Case of Attainder, the right Line is not disabled, unless he conveys by the Father, 3 Co. 38. 41. 13 H. 7. 17. the Husband shall be Tenant by the Courtesie by Issue after Attainder, Bract. l. 3. c. 13. & Brit. c. 5. 1 Inst. 12. And though it be here objected, That the Blood of the Mother is uncorrupted and pure, yet the Son must convey by the Father, though not from him. 2. In Relation to the Collateral Line, the same reason holds in Hobbies Case, which in the Record, Rem. Escheq. M. 43 Eliz. Rot. 292. In Information of Intrusion, it was adjudged that the

Daughter might inherit to the Brother as Heir to the Mother, though the Father were attainted, because there were no Heirs of the part of the Father; contrà where there wants no Heir on the part of the Father, but he is disabled to take, 3 Inst. 241. It was also objected against Hobbies Case, That there was once hereditable Blood, which is a worse disability notwithstanding, then that of nature, and therefore the true reason is, because the Brothers were mutually inheritable one to the other subjectivè & objectivè, which appears by the pleading of Cosinage, which only saith Brother and Heir of J. S. not naming the Father, so in Baskervils Case, though the youngest Brother shall convey from the eldest by the second: And if the second were Attainted, the youngest should not inherit, which is because the Estate was vested in the second, though he entred not, and he was actual Heir thereby, F. N. B. 199. The Assize of Mordancester doth warrant that they are Ancestors one to another, Dyer 274. as appears by comparing the Cases of Hobbie and Courtneys. Hence he concluded the Brothers partake of Blood of Father and Mother, but only natural; but relativè they partake of each others. 2. An Alien can neither be nor have an Heir, which disability is grounded on politick Reasons of betraying secrets, carrying away Coin, and raising Faction: But his Son born in England, is not affected thereby, but is intended to love his natale solum; and the Law doth but civilize that natural Blood that was in them before; for this Reason the Son shall inherit the Father, though the Grandfather were an Alien, which is grounded only on the Reason of those positive Laws that make civil. In Hobbies Case it was agreed, that two Brothers of a Feme may inherit, yet there must be Sanguis duplicatus betwixt them especially, though its requisite betwixt no others, and therefore the disability on the part of the Mother is the same as of the Father, 17 Jac. B. R. 2 Cr. 539. Godfrey *against*..... which was argued four times at the Bar, in which Case the Son was a Subject born in ours, naturalized, which is stronger. 2. There the Father was a Denizen before the birth of the younger Son; but as to that, had the elder Brother been born in England, he could not have inherited to the Father: And for these Reasons he concluded the first point, That the Discent is immediate betwixt them by the Law of Nature, which must prevail if no positive Law to the contrary.

(2.) Keeling the Kings Serjeant for the Defendant, That this is a new Case, depending rather on enquiring into the Reasons and Maxims of Common Law, then on Authorities.

ties. 1. As to the Natural Blood, it hath been agreed, That as the Law of England is they have none; the Ground is on Littleton, that he must be of the whole Blood to the last Purchaser actually seised; the Blood which makes Brothers inheritable one to another is that communicated from the Parents, and if they give none to them, they cannot inherit each other, for one Brother cannot give any to the other: Hence is it requisite in our Law, that Brethren should have the same whole Blood of the same Father and Mother, who being here Aliens, no resort can be made to them, and so no Discent betwixt Brothers that have no whole Blood: And the having a Mordancestre only, supposeth the one to have possession before the other; not that the being Brothers makes them Heirs, but the having the same Blood from Parents, 8 Co. the nearness of their Relation warrants not their inheriting each other, if the Blood they derived from their Parents be disabled. Hence if H. hath Issue a Bastard eigne, & Mulier puisne, by the same woman, yet because our Law takes no notice of such Birth before Marriage, there is no Blood betwixt them: And that one need not name his Parents, is no Objection, because the reason of naming is, that in every Writ I must set forth so much matter as is necessary to my Title, as (8 Co. Buckners Case & Ratliffs Case) in Estates Tail the first Donor, and derivatively from all the rest, so coment Cosin and Heir is necessary to shew in what degree I stand, but Brother and Heir appears prima facie of it self to be a good Title; yet the Defendant may resort to a disproof of my Title, by shewing an elder Brother, or any other disability, which the Plaintiff need not mention, Lit. Sect. 8. Stanford Pl. Coron. 195. So in the Case of Pardon, one may shew the Attainder, also one may be named in a Writ, Edwards *against* Rogers, 1 Cr. 524, 543. who yet conveyeth nothing to him that named him, Tr. 11 Car. Rot. 699. and so shall not in all Cases bar me. Hobbies Case differs from this in that the Parents at first had conveyed Blood to the Brethren, which is not touched by his subsequent Attainder, contrà where both the Parents were attainted, and have Issue after; but where the Attainder is only of one of them, the Heir is not disabled to inherit the other, Bacon *against* Bacon, 1 Cr. 601. Dutchy 442. in the Book of Decrees, The King *against* Eaton, for it is the whole Blood (in opposition to divided Blood by different Parents) being of the same Parents, though it be conveyed to them but by one of them. Courtneys Case doth not much concern this Case; but if it doth, its with the Defendant in the Case at Bar, 2 Cr. 539. Godfrey

againſt Dixons Caſe, comes not to this in queſtion, becauſe the Fathers diſability was taken away by being a Denizen, which is not in this Caſe; ſo it is, had the Father been made Denizen any time before his death, though after the death of his Son, theſe are all as Baſtards, beginners of new Families, and ſo their Collateral Line not inheritable to each other; and their Caſe cannot be better then if they had been born Subjects, in which Caſe they could not inherit, and they have no Anceſtors created by the Act, but only they are enabled to claim from Anceſtors, from which a Subject might have claimed. And that this Caſe hath received two Judgments, is a miſtake; for as to the one, betwixt Dawſon *againſt* Pace, 1655. was but a Nonſuit for want of an Entry ſufficiently pleaded, and no Judgment entred: Another 1656. betwixt Foſter and Ramſey in B. R. and ſo not being ſatisfied herewith, he prayed Judgment for the Defendant.

Knight *againſt* Dancer. Ante.

February 3.

Entred Tr. 13 Car. 2. Rot. 1500.

(27) Pope. REculant preſents H. who is inſtituted and inducted by the Biſhop then ſequeſtred; and another Preſents by a Uſurped Power, who is confirm'd till 25 Dec. The ſole Queſtion made by Jones for the Defendant, was, Whether this Preſentation be a ſufficient Plenerty againſt all Strangers.

Adjornatur.

Vandevelde *againſt* Lluellin.

(28) Priviledge. IF Witneſs, coming to teſtifie in a Cauſe in Middleſex, be arreſted in London by one knowing the Cauſe, he hath no Remedy but by Habeas Corpus to examine and deliver him thereby; but if there be any Contempt by the Officer, &c. an Attachment may afterward be awarded againſt him, for they are as well to have Priviledge as the parties.

Neave

Neave *against* Nelson. Ante.

THe Defendant pleaded Priviledge after Imparlance specially made, and Concludes ill, being unde petit Judicium si H. respondere compelli debet, which ends in piscem in a different manner, 36 H. 6. 17. by Billing, from the matter, being rather to the Writ, or in disability, then to the Jurisdiction: In all Cases the Conclusion must be directly warranted by the substance of the Plea, 7 H. 6. 36. Bract. l. 5. p. 415. 36 H. 6. 18. per Littleton; and this should have been, Judgment si Curia cognoscere debet. 2. Here is no Averment (which is necessary in all Pleas traversable) 36 H. 6. 37. b. per Choke, Pleading Br. 135, 1 Inst. 303. and the omission thereof is erronious, Amendment Br. 112. especially as to the Clerk of the Philizer, though he himself be an Officer of Record, 9 Ed. 4. 53. 3. The Imparlance is Salvo of all Exceptions to the Bill only, after which he cannot plead to the Jurisdiction, 9 Ed. 4. 35. though where it is apparent the Court hath none, they ex officio will oust themselves of Jurisdiction; and a Plea to the Jurisdiction is within the Salvo of Pleas to the Bill, and so he is estopt 7 H. 6. 36. by the general Imparlance, whereby he hath admitted it, 22 H. 6. 7. Windham conceived this is no Plea to the Jurisdiction, but apt enough for Priviledge, which Twisden agreed; but per Curiam, the Plea should be amended, unless he produce the Record, and is ill without it. 2. Unde non intendit quod Curia cognoscere velit, is not so apt as this: the Case of Crumpton *against* Colling is express, that such Plea, though brought in in person, must be averred. Adjornatur. (29) Priviledge.

Horn *against* Middleton.

IN consideration the Plaintiff would continue his Horses with the Defendant, he would save him harmless from all differences against Anne Godfry, who had done a wrong to the Plaintiff, in beating his Horses from watering, by Reason whereof varyances arose betwixt her and the Plaintiff, and she had Arrested the Plaintiff, and made him spend divers Sums of Money, by Reason of the said difference, and so the Defendant had not saved harmless: which by Jones in Arrest of Judgment, is totally incertain, and no Cause of Dammage to the Plaintiff by the disturbance of Anne, which was in a watering place. But per Curiam, this was but the ground, and Causes of Action may arise on both sides. (30) Condition.

2. It

2. It is said, that Anne and her Husband caused the Plaintiff to be Arrested, not shewing by Legal process, which per Curiam after verdict, shall be intended: But had the Arrest been illegal, being by Reason of those Controversies, the Defendant is bound to save harmless from it, per Curiam.

Judgment for the Plaintiff.

Tows *against* Lewis. Ante.

(31) Account. IN Legay *against* Amery, it was ruled, That by death after Judgment, quod computet, the Action is abated; which Foster and Twisden agreed, contra to Allen and Jones. 2. The Bail in Account is only to render the final Condemnation, which cannot be, unless the party be retaken after the Judgment quod Computet, whereby he may enter into Account: But by Jones, the Recognition of the Bail upon a Judgment, quod Computet, is that the party shall appear de die in diem, &c. this being only on Motion, and the Bail taken in Execution at the Suit of Executors by Scire Facias after Judgment quod Computet, Quare Executionem Habere non debet, the Court refused to order any thing, but referred it to the Secondary to examine the practice of the Court, the Recognition being in no certain Sum. But by Windham, the better way is to have Error, which the Court agreed, and that it was Erroneous. Post.

Toomes *against* .....

(32) Slander. THou art a Whore, and a Common Whore, and hast layen with every Man that came to thy House, and hast played the Whore with J. S. without Special Dammages, not Actionable.

Brook *against* Hanchif. In Error Br. 37.

February 4.

(33) Entry of it at any time before exception taken, was good by 26 Ed. 3. 64. b. or 10. b. pl. 6. 2 Brownl. 167. pl. 148. Goldsb. 91. pl. 3. 2 Cr. 186. pl. 7. 1 Brant. 196. pl. 435. Hitch. 2. b. pl. 11. 2 Cr. 418. pl. 8. 2 Brant. 79. b. pl. 215. Hill. 13. Car. 2. 1 Brownl. 46. pl. 253. WAnt of a Warrant of Attorney is not aydable, but if ever there were any, or a Bill, the Court will cause it to be filed, though it be lost.

Kettle

Kettle *against* Meers.

IF Judgment be entred upon a Warrant of Attorney (which is usually on Confession) if it be contrary to the agreement in trust made at the same time, the Court will vacat it, per Curiam, upon Suggestion by Affidavit. (34) Uses.

The Inner Temple Benchers *against* Legingham.

THe Court committed him for a Rebellion made in the House whereof he was Principal, and ordered an Information against him, and that all the rest be bound to their good Behaviour: Resistance in particular Societies being, quodam modo, against the King, and the original of the late irregular times, by Windham. (35) Peace.

Prideaux *against* Sharswell. Ante.

JOnes demurd upon the Replication, because it answers but to the Interposition of part of the Closes in which, &c. and so Verdict for the whole, 10 Ed. 4. 7. by Bear for the Plaintiff, is express, That if Cattle Estray through the Close of a Stranger, who ought to repair, into mine, the Defendant shall pay Dammage for the whole, because the Plaintiff is not bound to enclose, and the Defendant cannot Justifie in the Lands of a Stranger, 22 Ed. 4. 5. 49. b. pl. 15. This is the Reason why H. shall pay Dammages for delay in turning his Plough, though not for a sudden. 2. The Bar is insufficient, because being a Justification against inclosure, must prescribe in the person. Bar F. 168. 10 Ed. 4. 7. 22 H. 6. 36. Dy. 365. b. Baker *against* Breman, in Action upon the Case 15 Car. 1. Rot. 352 being a local thing, is ill; so Semains Case: This is more properly a personal previledge, and it doth appear the Defendant hath no Title to that Close where the Beasts strayed. But by Jones, this Prescription in the person was not the constant way of pleading; but being uncertain, and the Defendant not knowing what Estate the Plaintiff hath, it is better to plead it as a Custom, being alledged in another Man, contra, if it were made in himself; which the Court agreed. And by Windham, if Cattle stray into one Close in Default of the Plaintiff, and so through other Closes of Strangers, which the Stranger ought to repair, into other Closes of the Plaintiff, the Defendant may Justifie in all, for Causa Causæ, is Causa Causati, though he shall (36) Trespass. Godbolt. 55. pl. 68. Stiles. 357. pl. 762. Godbolt. 54. pl. 68. Bulstr. 133. (37) 2 Cr. 165. pl. 19.

shall not have benefit against the stranger, like a Disseisor that conveys in the Per Cui & Post, yet if it comes to the Disseisor again, an Assize lyeth as at first. Windham, Suppose the Bar ill, the Trespass being laid in three several places, and the Defendant saying that the owners of one ought to inclose against his, out of which the Cattle strayed, which is no good Justification of the Cattles going into other Closes, that were fenced, if it had been out of repair, and so the Plaintiff had been in default; (entred M. 14. Tr. 13. Car. Rot. 151. Hudson *against* Binion, Yelvert. Child *against* Durrant, 21 H. 6. 2. for the Park of Chedinglye is contrà) to all which Foster agreed, 22 H. 6. 33. Tr. 2 Jac. Goldsmith *against* Harris in Replication, taking Cattle in five Acres, the Defendant pleaded they escaped out of the way into a yard into the Plaintiffs Close, and so into a Strangers, and so into the Plaintiffs, or continue always in the Plaintiffs Closes, adjudged a good Justification. Twisden, This special Prescription, is but in nature of a Licence to put Cattle into Bl. Acre, which cannot go into other Closes, unless Contiguous and out of repair, which Foster and Mallet agreed 3. The Defendant said the fences of the Plaintiff were minime reparata; the Plaintiff sayeth, they were sufficiently repaired; the Defendant, ut prius, saith, that they were out of repair, Dy. 22 Eliz. absque hoc, that they were sufficient, which is the proper way of pleading. But by Twisden, when the Defendant had said they were out, and the Plaintiff after saith they are in good repair, he must conclude & hoc petit quod inquiratur per patriam, and not leave the Defendant to a Traverse; but if the Defendant had not positively affirmed they were not repaired, then the Plaintiff cannot conclude the Defendant from his Traverse, by concluding & hoc petit quod inquiratur, &c. which Foster agreed. Adjornatur.

Smith *against* Scolfield.

(37) Records. The Postea belongs to the Court, by Jones for the Defendant, and the Court may cause it to be brought in by the Plaintiff, though they will not force him to enter his Judgment, which the Court agreed.

The

The King *against* Mucklow.

February 5.

CErtiorari is not to be allowed, without putting in Sureties in open Court; yet if the party will not, the Clerk of the Peace must return it, and that the parties did not put in Sureties, as by Twisden was adjudged in the time of Judge Baron, and for not returning it, the Court granted an Attachment: Also the Statute extends not to Endictments of forcible entry, but only to Ryots, &c. as hath been conceived, and the Justices cannot make any Order against returning it. Adjornatur. 231. pl. 51. (38) Certiorari.

Cranmer *against* Andrews. Ante.

THe Secondary, upon search, reported all the Presidents to be, that unless the Wife be arrested, or the Husband give Bond for her appearance, he shall not be forced to put in Bail for both, if he will lye in Prison, but else he shall, before he can be bail'd in Debt upon a Statute entred by the Feme dum sola against Baron & Feme, which the Court agreed. (39) Baron & Feme. In Default Br. 52. Stiles 475. pl. 1060. *contrà.*

NOta, per Curiam after special Issue joyned, the parties cannot waive it, and plead general Issue without motion in Court. (40) Issue.

Furnage *against* Norton in Error, Br. 93.

AFter in nullo est Erratum pleaded, none may have a Certiorari to disaffirm the Judgment, contrà to affirm it, though when it comes in advantage, may be taken of Errors; and though the Plaintiff may have it before without motion, yet not after such Plea pleaded. (41) Error. 2 Cr. 443. pl. 24. Godbolt. 407. pl. 18.

Foster *against* Foster. Ante.

February 6.

DEmise, grant, bargain, sell, and set over, were the words in Articles of Agreement, the Causes being divers, especially for 40 l. to be paid to her Assignées after her death, betwixt Margery and Matthew Foster, the Demise was to Commence after the death of Margery, and she to have a (42) Assurances.

ferme of Matthews, during her life: And this Deed is found to be made as well for love and affection as 40 l. and after there was another feoffment for affection and money to Nicholas the Brother of Matthew, and Son of Margery, executed by Livery. Raymond for the Plaintiff, conceived nothing passed to Matthew, which had been clear if the 20 l. had been left out. He agreed, Tib & Poplewells Case, and Foxes Case, and Wingfields Case, Dyer that Uses will not arise, but according to the intent, 21 H. 7. 19. Dyer 59. Pl. Com. 301. Crompt. Jurisdict. 60. b. & 27 H. 8. By the word Agreement Use at Common Law might have risen by parol: He also agreed Beedells Case; but nothing will arise by such Bargain and Sale for affection and money without Enrolment, 11 Co. 25. a. 4 Co. 81. 8 Co. 118. 8 Co. 154. Pagets Case in the Rector of Chedingtons, comes to the Case at Bar, that no Averment could be contrary to express ones in the Deed, Wats *against* Dixe, Stiles 189. pl. 431. 2 Cr. 127. Osbornes Case, 3 Cr. 394. Ward *against* Lambert, so Althams Case, the finding of the Jury shall not alter the Case, as that a Deed to H. and his Heirs was in Tail, or the like; 5 Co. 26. 1 Co. 176. Pl. Com. 114. b. 2 Co. 75. a. 2 Co. 24. and here the finding of the Jury consists not with the Execution of the Estate, nor with the Estate of Matthew, nor with the Interest of Margery, who was to have money for it; also the intent of the parties, which is to be observed, Dyer 56. b. per Shelly, must be construed ut res magis valeat, 3 Cr. 601. but yet that is to be collected by the best Consideration, Dyer 261. Bridgman 100. Nusam *against* Carew. 2. He conceived this to have reference to a future Conveyance, and so not effectual to pass an Estate present, Noy 128. P. 33 Eliz. Ashford *against* Barton, B. R. Covenant that H. should have in Tail after the death of J. S. was ruled ill. 3. Margery hath not title to the Barn of Matthew but by the Covenant, and so neither should Matthew take otherwise. 4. Here is a particular Estate reserved out of the Feoffment, which is void, 1 Co. 129. 26 Eliz. Tr. 3 Cr. 29. Clamps Case, Dyer 309. the Case of Pitfield *against* Price. Also this appears by the Acts subsequent, 9 Co. 11. a. not to be the intent of the parties, because she made another Deed: Also her mentioning the 20 l. appears she intended it not as a Covenant to stand seised, for then her Executors have no remedy for the 20 l. which would be mischievous, 2 Co. 35. b. and hereby also it would be unsafe for Relations to article upon valuable Consideration, because all would be wrapt up in the Covenant to stand seised, Darby *against* Bois, Yelvert. 123. and no recompence can be had for it; and the Case of Simpson

ſon *againſt* Guines, Mich 59 C. B. Dyer 19. a. 7 H. 7. 14. Owen 33. and the Caſe of Sanders and Savil, come not wholly to this Caſe. Windham conceived the Defendant may well be ſick of this Caſe, it being now found miſchievous to conſtrue Deeds otherwiſe then the clear Intention of the parties; and the Caſe of Pitfield is unanſwerable, which was, give and grant to his Son, which of their Nature tranſmute an Eſtate, and ſhall not be a Covenant to ſtand ſeiſed without particular Intent. A ſecond Reaſon of that Judgment (which was after long Argument) was, That it was in Conſideration of Marriage; alſo the fair and plain meaning of the Deed in the Caſe at Bar was, in Relation to a future Settlement; Twiſden to the ſame intent; and Symſon *againſt* Calye, in Ejectment, the Father for affection to his Son, and Marriage, did give and grant, and Livery was indorſed, but not found by the Jury, and that was adjudged to be a good Covenant to ſtand ſeiſed, which was a hard Caſe. Alſo Wats *againſt* Dixes Caſe, where Pitfields Caſe was cited, it was given as a Rule, That if the intent was to paſs it one way, it ſhall not paſs another; and he was Counſel in that Caſe. Foſter was Counſel for Pierce *againſt* Pitfield, which was ſaid to have the Opinion of the C. B. (but he decryed Noyes and other private Reports.) Adjornatur. 1 Brant. 348. b. pl. 861.

Stephens *againſt* Bretheridge. Ante.

A Covenants to ſtand ſeiſed to the uſe of himſelf and his Wife for life, and to the Heirs of their two Bodies, the Remainder to his eldeſt Son by a former Ventre, and after they have Iſſue a Daughter, and then they levy a Fine after Feoffment, &c. 1. Jones for the Plaintiff conceived this but one intire Eſtate executed, however called a Remainder by the parties, 35 H. 8. Eſtates Br. 75. but when there is an interpoſition betwixt the particular Eſtates and the Remainder that hinders their union, and the Law will conſtrue them to be diſtinct Eſtates, becauſe they may ſerve to ſeveral purpoſes, 37 H. 8. pet. Br. 303. 3 Co. 5. Morgan *againſt* Owen. And in the Caſe at Bar, the Baron and Feme do not take by moieties, the Eſtate being not made before Coverture, and ſo by a Divorce the Wife cannot take the Profits during his life; and at Common Law upon ſuch an Eſtate before, 32 H. 8. c. 28. the Wife might enter for a Forfeiture of the Husband, and ſo his Eſtate, and the Reverſion to the Son, cannot unite. 2. Admit the Eſtates diſtinct, by this Fine and Warranty there is no diſcontinuance; not by the Fine alone, Litt. no diſcontinu- (13) Tail. In Diſcontinuance Br. 38.

ance can be of an Estate Tail, unless he were once seised of it, King *against* Edwards, 1 Cr. 320. was by three against one adjudged: And the Reason all go on, is, because the Estate Tail is executed; yet contrary to Owen *against* Morgans Case, and so is not like this Case at Bar, though to many purposes, as to have a Mortdancestre, or Writ of Right, 1 Inst. 184. &c. such an Estate shall be said executed; and here the Baron & Feme take not by moieties in that Case as they do in this. 2. The Warranty doth not make any thing, unless there be some precedent devesting of the Estate, 10 Co. 95. Seamors Case, that cannot operate; and that there was none here is evident, no more passing by the Fine then what they may pass, and this is expressly Bredons Case, when the Estates are in several persons, which Judgment was never denied, though the Reasons of it have; and in this Case the Baron & Feme have several Rights, 3 Cr. 828. as Pecke *against* Channels Case, 13 H. 7. 14. and so the Warranty can never affect them, being not devested or displac'd.

(2.) Maynard for the Defendant, agreed the Case, and conceived the first point to be, whither this Fine be a discontinuance properly so called, which he conceived it was, because the Estate is executed, that is, in him that makes it, but it is not requisite, that he be seised to all purposes; this is evident by the very Conveyance it self, the Limitation being as to the Baron for Life, Reversion to the Feme, which shall be for Life, the Reversion to his Heirs of her Body begotten, which makes them Tenants in Tail of the same Inheritance which is limited to the Husband; and though it be not altogether the same, as if limited to the Husband and Wife, and the Heirs of their Bodies, yet it is as much in him without any severance, Lit. Sect. 672. and they must be remitted to the whole: and Bredons Case went far enough, and hath been often Questioned, but yet differs toto Cœlo from this, being several persons of separate Estates, and this Reversion in the Wife is inseparable, and not to be granted alone, Hacker *against* Baker. 1 Cr. 387. was upon this Reason adjudged a discontinuance; and in the case of King *against* Edwards, it was said, that the Estate tail was so in the Husband, that he might discontinue, though not so as to Bar the Issue from his Mordancestre, or Writ of right, or Scire Facias, &c. and the surviving of the Wife in that case was considered, and though H. in Reversion, as well as the Wife, shall by 32 H. 8. take advantage of a discontinuance by the Husband, by Feoffment alone, yet Fine it self would not have alone made a discontinuance, but both together, being but one assurance;

and

and the Fine in the case at Bar, is Come Ceo, which supposeth a Feoffment before. 2. This will at least devest the Estate, according to the plain intent of the parties, in the Second Fine, which passed a larger Estate then the base Fee before, limited at least by the intent, and on the Reason of discontinuances many Estates depend, and is the security of most purchasers, and therefore not to be weakened, the learning thereof being for quieting possession, is to be favored, as it hath been against the Church; yea, Acts of Parliament themselves, as quod ipso Jure sit nullus, Pecke and Channels Case, could not be a discontinuance, because the Husband could not surrender to the Wife, and she could only pass her own Estate, and there could not be an union; and so being divested, the discent of the Collateral Warranty doth Bar the Plaintiff. Windham conceived the present Freehold of the Husband is not drowned by the limitation, but the Estate is in him quodam modo, all joyning in the Fine, he is Tenant to the Præcipe distinct, and they had all the Estate in them. And by Foster this may be granted, and if any way this; and by Twisden, this Estate is Executed, and there is not any Case to the contrary, but only for the benefit of a Survivor, or a benefit to a third person, which here is not Material; and a devesting may be without any discontinuance properly so called: and by Allen, Bredons Case is agreed in Clanrickards Case, Hub. for good Law, for else it would be a forfeiture of the Tenant for Life, if it were a devesting. Adjornatur. 1 Inst. 322. b.

Ellis *against* Ellison. Ante.

(44)

TWisden conceived they could not amend it in another Term, Beechers Ca. 59. 1 Cr. Nelson *against* Skeer, Hut. 41. Shirly *against* Underhil, 1 Cr. 580. though in the C. B. it may; and the Course in Secondary Brooms time altered, by reason of the multitude of Cases, which increased, and were not at large to be entred, which was the reason of Keyes *against* Ireland. Windham and Foster agreed the Case to be hard, but being an auncient Landmark is not, to be removed, but this is ayded by 16 & 17. Car. 2. Cap. 8.

Error. 8 Co. 162. b. ac. 2 Cr. 538. pl. 5. acc. So 2 Cr. 632. They will not amend Judgment of Inferiour Court, that is, *quod demandant teneat* for *recuperet*, so it is held Error.

The same Term Judgment in Trespass was amended, in omitting *quod defendens repararet menia* 18 Ed. 3. 23. pl. 6.

The

The King *against* Read. Ante.

(45) Perjury. THe Judgment of the Court delivered by Foster was, That he be fined 100 l. and Imprisoned till paid, and that he go round each Court at Westminster with a Paper about his head, testifying his fault, and then to stand in the Pillory in the Pallace-yard in the same manner for two hours.

Towes *against* Lewis. Ante.

(46) Bayl. IF H. comes in by Habeas Corpus only to account, he shall not put in Special Bail; but if they do, it is Erroneous.

Sinderf. 77. pl. 10. Granger *against* Hemborough. Ante.

(47) Covenant. Entr. Congeable Br. 2. JOnes for the Defendant, conceived the difference to be betwixt condition to perform particular things, and when, of Covenants in general; which by Twisden is not material: and by Windham, this is but an excuse after a particular affirmance, that he had actually performed; Mallet, contrà, that the Plea is good; and by Foster, the Plea though not fully pursuant to the former, is not contrary to it, nor dissonant from it, because no rent was due, and so he hath paid all that was due, But by Twisden, he could not have pleaded such an ouster after payment of Rents pleaded, because payments is intended actual, and so of performance of Covenants, 1 Inst. 204. or 304. And it is not sufficient to shew an offer or performance in Law. Adjornatur.

Johnson *against* Bridges.

(48) Condition. IN Debt upon a Bond for performance of Covenants, the condition was in the disjunctive, that H. should make a conveyance when he came of 21 years of Age, or in default thereof that the Defendant should pay 50 l. The Defendant pleaded no notice of any Conveyance before the Death of H. on which the Plaintiff demurred, as not material, the Defendant having Election to pay or convey; which the Court denyed: and that as this condition is, if he do not one, he must do the other at his peril. Adjornatur.

The

The King *against* Bodish.

February 7.

STroud Sen. on 1 Cr. 180. moved to quash an Indictment of Perjury for the King, the Verdict being for the Defendant; 1. Because it was taken on Depositions out of the Chancery, the King *against* Apsley, H. 23 Car. 1. and Hunsters Case 14 Car. ruled that they ought to say (being by Commissioners out of the Chancery) under the Great Seal. But by Allen for the Defendant, that's needless, because its said that the Commissioners had Authority lawful, which is sufficient. But by Windham and Mallet, he ought to specifie the Authority: But by Twisden 1 Cr. Stone *against* Numan is general 2. The Venire Facias is but of twelve, but four and twenty being returned on it, its good enough per Curiam; and if there be a full Jury, the Names are not particular in the Postea in the Return, contrà if there be a Tales. 3. He excepted that there being a Change of Government pendant the Suit, and no mention made of it, its ill, sed non allocatur. Adjornatur. (49) Perjury.

The King *against* Alcocke.

HE was Indicted for compassing and imagining the death of the King, and declared it by saying The King was a Bastard, the Queen was a Whore, and he is gone to carry the Whore his Mother out of the Land, and I hope he will come short home; but I will kill him if I can when he comes back, wherever I meet with him. But it appearing to be a malitious Prosecution, the Jury acquitted him, and taking the Oath of Allegiante, he was discharged. (50) Treason.

The King *against* Mucklow. Ante 225 pl. 38.

IF any of the Persons Indicted put in Security, the Indictment must be removed for all, because its only to secure Costs, by Twisden & Curiam; and Sir Humfrey Mildmay was fined for not returning such Certiorari, and the Hands of the Justices need not be set to it, no more than the Sheriffs, by return of the Under-sheriffs, and Habeas Corpus, though not to be allowed if under 5 l. yet it must be returned that it is under 5 l. (51) Certiorari.

Win-

Winterborn *against* Kendall. Ante.

(52) Amendment. ALlen prayed the Record here being right in Court, and amended below, and only (sw. i. e. sworn) omitted in the Memorandum upon the Return of the Postea, that it needed no Amendment, but was well enough; which the Court agreed.

(53) Apportionment. IN an Action of Debt upon several Obligations, having but one Count and several Issues, some found for the Plaintiff, and some for the Defendant; and several Damages, but intire Costs. Jones prayed that the Judgment may be reverst only as to part, as Miles *against* Jacob, Hub. 6. But Allen for the Plaintiff said, That Case had often been denied to be Law, and that neither as to the person, nor as to the things, a Judgment cannot be reverst in part no more than a Fine, as Odyhams Case; to which the Court also enclined: Sed Adjornatur.

(54) Condition. In Condition Br. 47. 3 Cr. 864. pl. 42 Goldsb. 142. pl. 55. H. Covenants to pay 500 l. on Dec. 12. or to secure it on request in Action brought for Non-payment at the day. The Defendant said there was no demand: Whereunto the Plaintiff said, That he did demand Security. To which the Defendant demurred generally; and now sheweth, 1. That no demand was of the Money at the day, and the Obligor hath Election to pay or secure, which the Court denied as this Case is. 2. The Action was brought by A. Administrator of B. de bonis non per C. &c. and averreth that H. had not paid to B. nor to A. (not saying he had not paid to C.) Sed non Allocatur, because the Count is quas ei injustè detinet, which per Curiam cannot be if it were paid to C. Also this lieth on the part of H. to plead in discharge of himself.

Polixphen

Polixphen *against* Branford.

February 8.

TWisden doubted whether Visne after a Nonsuit before, may be laid in any County at the Plaintiffs Election, by consent to examine Witnesses that were Officers in the Admiralty here, because they may be in person at either place: But per Curiam its well enough, when it appears they cannot reasonably be present, the principal Issue being whether H. sued there or not. Post. (55) Visne.

The King *against* Field. Ante.

ALlen moved in Arrest of Judgment, 1. Because the Indictment is not pursuant to the Law, the words not being said to tend to bring People in dislike of the Kings Person, which should be; and not only to say, that he intended to bring the People in dislike, &c. 2. The words are said against the Government, which is generally intended of the Realm, not Ecclesiastick. Glyn the Kings Serjeant, conceived the Statute to refer to the intent, and not that the words should be such as should actually incite. 2. The Government of England is all one, and all from one Fountain, though in several parts. Windham quered if it had been said, the Government by Justices of Peace, or in the Kings Bench, had been inconvenient. Keeling the Kings Serjeant agreed, If he had said such a Bishops Court had been inconvenient, that had not been within this Law; but the Indictment mentions no distinction, but is of Government in general. Twisden, The Government in this Act had a particular reference to that which had been before abolished by an Ordinance of the Lords and Commons, which was Episcopacy: But to say the Civil Law is better than the Common Law, that the Chancery or B. R. is an unnecessary Court, is not within this Act; which Foster and Mallet denied. Windham conceived ea intentione to refer to all the Indictment, and that the Ecclesiastick is the prime part of the Government of England, and was the chief intent of the Act to re-establish; though he did not conceive every particular subordinate Jurisdiction to be within it: But all agreed this to be within the Act. And so Foster pronounced Judgment, That he be disabled to bear any Office, and be fined 500 l. and imprisonment till payment. (56) Treason.

Siderf. 71. pl. 9. Dr. Withringtons Case. Ante.

(57) Mandamus. CHief Justice Foster delivered the Opinion of the Court to be, That the Return is to be taken for true, and hath alledged sufficient Cause of Expulsion; and that the Doctor cannot have Restitution.

The Earl of Bedford *against* Austin.

(58) Escape. IN Action on Escape, The Defendant confessed that H. was in his Custody by Latitat Ret. Mercurij Craft. Animarum, but said that a Supersedeas came to him (varying from it) reciting a Writ returnable Die Veneris Craft. Animarum; for which Variance the Plaintiff demurred, as not the same Action; which the Court agreed. Judgment for the Plaintiff.

Harrison *against* Knight.

(59) Arbitrement. So Illue *sur debruiser del Parke* found for the Plaintiff in Trespass, is good, though the Plaintiff did not travers *absque hoc*, that the Defendant offered Pledges to his *Fem*, as he pleaded. 30 Ed. 3. pl. 35. IN Debt for Non-performance of an Award; after Oyer the Defendant sets forth the whole Award, and pleads performance. The Plaintiff saith he paid not 10 l. according to it; the Defendant rejoyns he did not pay; and the Jury find he did not pay. And by Allen for the Plaintiff, though the Verdict be impertinent, yet without relation to it, there is sufficient Title for the Plaintiff, 9 H. 6. 37. 36. 6 H. 7. 11. But by Windham this is an Error after Judgment, and therefore is considerable. Judgment for the Plaintiff, Nisi. 235 pl. 62.

Brown *against* Brown.

(60) Covenant. 3 Cr. 864. pl. 43 2 Cr. 233. pl. 2. IN an Action of Covenant upon Conveyance of a Fee-ferm Rent by the Father to the Son, and his Wife covenanting, he had good right. The Plaintiff said he had no good right. The Defendant saith that the Covenant was ulterius that the Son should enjoy it notwithstanding any act done by the Father, and that he did no act, which by Allen for the Plaintiff is ill. Jones for the Defendant, This later Covenant doth restrain the former, and is pleaded to be in the same Indenture, all the parts whereof shall be taken together, as Nokes 4 Co. 81. and the particular shall qualifie the general, the Covenant being, That the Covenantor tantummodo warrantizaret, &c. which Windham agreed: But by Allen they ought to have set forth the Indenture,

ture: But by Twiſden and Windham that is confeſs'd by the Demurrer. The Plaintiff deſired leave to diſcontinue, being after demurrer joyned. Poſt. 239. pl. 75.

Detinue Br. 2. Brown *againſt* Martyn. Poſt.

IN Indebitatus for 20 l. delivered by the Plaintiff to the Defendant. The Defendant pleads the Plaintiff was accuſed before J. S. for Coyning, and L. was to proſecute, and this was only delivered to the Defendant as a pledge to ſave him harmleſs if L. did not proſecute. Upon which the Plaintiff demurred, becauſe it amounts but to the general Iſſue (of Non-Aſſumpſit) being delivered as a Pledge; but he cannot plead Non Detinet. Adjornatur. (61) Maintenance.

Harriſon *againſt* Knight. Ante. 234. pl. 59.

THe Caſe 9 H. 6. is a Caſe hardly to be ſampled; and this is no Confeſſion expreſſed, but only by miſ-joyning of the Iſſue. But by Allen, The Verdict is idle, and there is a Breach expreſſly confeſſed in the Bar; but the Judgment is given by the Jury, &c. But by Twiſden, The Court will give ſuch Judgment as the C. B. would have given upon the whole Record. Adjornatur. (62) Iſſue.

Jones *againſt* Edwards.

ERror of a Judgment in Wales in Dower, the Demand being againſt one, and the Deforcement ſaid to be by another, who only was ſummoned, and not the Tenant to the Præcipe, who was Margaret, the other being Jane. Judgment Reverſt. (63) Wales.

Gibſon *againſt* Giles.

IN Debt for Rent, The Plaintiff counted on Demiſe of a Rectory for 21 years, yielding 100 l. yearly Rent, if the Leſſor or his Deputy ſhould ſo long officiate. The Plaintiff avers he did officiate, according to the Covenant, &c. And the Defendant ſaid that he did not by himſelf, nor his ſufficient Deputy. The Plaintiff replyed he did officiate by himſelf and his Deputy: On which the Defendant demurred, becauſe double, and not purſuant to the Indenture, Pithie *againſt* Jacob, which is averred to be done by the Plaintiff himſelf only; and he muſt have ſhewed who did officiate in his abſence by (64) Rents.

particular Name. But by Twisden this is needless, and its well reddend' singula singulis; and a great mischief by Windham would ensue, if every Deputy or Assistant should be named, being not a single act, but of Continuance, (as Issue upon payment to H. is good, when payment is to H. or his Assignées:) Ordered that both parties amend, and go to a good Issue.

Whiteacre *against* Dacres.

February 10.

(65) Ejectment. Stiles 164. pl. 439. PEr Curiam Ejectment lyeth de uno Stabulo, or wherever the thing is so certain, that the Sheriff may do Execution.

(66) Judgment. NOta, per Curiam, when the Judgment is given for Security to stay a Trial, Execution can never be on it if the party dye before issue tryed, as Digbyes Case.

Polyxphen *against* Branford. Ante.

(67) Admiralty. 1 Brownl. 4. pl. 21. IN an Action upon the Statute for prosecuting in the Admiralty, contrary to the Statute. The Defendant offered to plead Not guilty, which is not receivable till Visne settled; The Evidence was of seizing a Ship in Devon, where by Maynard the Action ought to be laid; Sed Curia contrà: And that Prosecution in the Admiralty can be tried no where else; And Non prosecutus fuit is no good Plea, but a departure.

The King and Clerk *against* the Churchwardens of C.

(68) Poor. KEeling moved to quash an Order of Sessions, on 43 Eliz. 2. which enables the Churchwardens, together with the Overseers to tax for the poor, with the consent of the two next Justices, this being not made in the same, but in another year, and directed only to the Churchwardens. Wild pro Rege, This very Case, he said, was one Peckhams at the Assize at Maidstone, where the Intestate having laid out Moneys as Overseer, he was reembursed by order of the General Session, which by Hale Chief Baron was good within the Statute: And by Windham, I know at Salisbury the Justices of Peace, by very good Opinion, having the original care of these things, this being Casus omissus (that the Overseer is obstinate, and will not disburse

disburse any thing) the Justices may compell them, and make a Tax for the Poor of themselves in the same, or another year, and so here, Dalt. 40. p. 116. But by Stroud, That Tax was made in the same year. Twisden, It is doubtful whether any provision were for the Poor before the Statute 43 Eliz. they increasing on the dissolution of Abby Lands. But by Foster, he disbursing without consent of his Partners, and no care being taken Monthly for to take Accompts, this Order is null. Windham contrà, That the Order being good of it self, the Court will not quash it for matter dehors suggested. But by Twisden, The Order not being to the Churchwardens and Overseers, it must be quasht, and so it was per Curiam.

Hoard *against* Charles.

(69) Tryals.

UPon an Issue out of the Chancery, tryed in B. R. if Excessive damages be, or the Jury say other things (then expressed) were included in the Verdict, the new Tryal must be granted by the Chancery, per Curiam.

Smith *against* Noseworthy.

(70) Error.

ON 1 Cr. 481. South *against* ..... and 561. per Curiam, so H. 23. Car. Jeoffryes *against* Scot, if a Writ of Error be brought by the Bail, tam in redditione Judicij, against the Principal, as against the Bail, quam in adjudicatione Executionis ad damnum of the Bail; and this being the same point, Jones for the Principal as amicus Curiæ, moved that the Error might be quasht, and so it was, per Curiam.

Hunt *against* Harelwood.

(71) Varyance.

IN Action upon the Case on promise to pay several Sums aforesaid, and the Plaintiff said the Defendant had not paid the several Sums, being in toto 75 l. which was miscast; and Judgment being given, Error was assigned in this; Hub. 89. Bail. but by Wallup, the Action being not founded on it, and the Issue having reference to the several Sums, Dy. 55. pl. 8. not to the Sum, H. 3. Jac. Faner *against* Snelling, assigning breach by not payment of the Rent at several days in toto 70 l. which was miscast, yet ruled good only Damages being recoverable; Tr. 9. Jac. Armitrage *against* Trice which shall be according to the truth of the Case, Busby *against* Haverton, M. 1657. Wood *against* Louth, In Action upon the

Dalt. 40. p. 116. Moor 298. pl. 444. 2 Cr. 247. pl. 5. 2 Cr. 629. pl. 2. Noy 88. Yelvert. 5. 1 Bulstr. 171.

the Case for work done for building an Iron-mill; and divers particulars amounting to so much; the Defendant pleaded payment M. 3. Car. Rot. 507. Cook *against* Jeoffryes, in the same point in toto, being so much which was miscast; yet on debate in Arrest of Judgment ruled good; the Case of Cook and Jeoffryes was reverst for this Error, because the Action was founded on it, and miscasting was moved, which is stronger then if it had bæn less, 2 Cr. 569. and Risby *against* Hales 2 Car. and though this miscasting might lead the Jury, yet here is apparent Reason for the Jury to give more then the Sum, because of his Special Dammage. Twisden conceived the very difference to be when more, and when less is alledged to be miscast, which was the Reason of the Judgment betwixt Wood *against* Louth. Adjornatur.

Stiles 341. pl. 727.

Seignior Clare.

(72) Nota. Joynder.

IF several Tenants clame under one person by one Tytle, and the Plaintiff hath but one against them, they all may be joynd in one Action: But not so where he hath several.

Booth *against* Beard. Ante.

February 11.

(73) Amendment.

ORiginal in a Term after Imparlance, by Wild, by the course of C. B. is well enough after Judgment; and it shall be intended that the party appeared de novo; which by Twisden is against Law upon Nil dicit, or non sum informatus; contrà in Judgment by confession, which may be the same Term: But in the other Cases he must have time to plead. And this is but to shoar up a Judgment, which appearing on the Record certified (in Tanner *against* Bachelor) upon Diminution alledged after Judgment removed in want of an Original; and Roll was of this Opinion: And the Court conceibeded it to be against Law, and would not rule it one way or other till further advisement. Adjornatur.

Win-

Windybanke *against* Bear.

IN Assise for the Office of Clerk of the Privy Signet of England, First the Assize was arraigned, then Oyer of the Count, then of the Writ and Return, after which, as in Pagets Case, Special Imparlance to except against the Writ was prayed, with Copies of the Writ, &c. which the Court granted; then the Recognitors were called, and adjorned: But the better way should be to have given Special Rule, without any Entry on Record: also the Court refused to enter the Count before the Writ be allowed, especially being of an Office, as by Foster, was in Jehu Webs Case, and it should first be read in Latin by the Secondary. (74) Office.

Brown *against* Brown. Ante 234 pl. 60.

ALlen for the Plaintiff, Had there been such a Covenant quod tantummodo, &c. The Defendant might have pleaded Non est factum, but cannot plead it without shewing the Indenture, having not demanded Oyer of the Indenture when produced by the Plaintiff. Adjornatur. (75) Non est factum.

Philips *against* West.

YOu set on Folks to Murder your Husband, and you rob him of all his Linen, that he had not a Shirt to bury him in: He being then dead, the last words were agreed not material; but of the former it was doubted. Post. (76) Slander.

The King *against* Brewster.

IN Indictment of Perjury, Williams moved in Arrest of Judgment, the Presentment being in English it is presented. 2. It is said, that he received in satisfaction 3. Martij 1648. and saith not, in the year of our Lord. 3. It is said that the Mony (payment whereof was the point of the Perjury) was paid prædict. Johanni, whereas his Name is William, 9 Car. Juratores pro Domino præsent. omitting Rege, only the Tenor of the Record being removed out of London, may be amended here; and so in the Case at Bar, by Twisden, which the Court agreed. Adjornatur. (77) Perjury.

The

The King *against* Roberts.

February 12.

(78) CArpenter moved to Quash an Order of the Sessions made for a Collection on a Brief for a Fire, to bring the Officers to Account of what they gathered, &c. which being by Letters Patents, the Justices have no Conusance. Twisden, The not confirming it is as good as if it were Quasht, and confirm it; the Court agreed they could not.

Coxe *against* Denton.

(79) Peace. THe Justices must certifie some colour of their Jurisdiction, else his Court will not confirm their Orders, and all wages are not within the Statute; and this being for wares sold, and work done, it was quasht.

Tribut *against* Reynolds, Ante.

(80) Baron & Feme. 3 Cr. 848. pl. 1. Stiles. 255. pl. 579. BArnard moved for Judgment in Assumpsit to pay to the Wife, if the Husband would assign Lease, &c. 1. No person certain to whom being named, it shall be intended to be to him with whom the Communication was, Coulman *against* Blunden; which by Twisden, is intended only when the promise is pursuant and created by Law, but not when it is collateral or express. 2. It was not shewed how long the Assignée enjoyed it; but its said he enjoyed it the whole Term afore mentioned, which is certain enough. 3. This promise might have bèen to the benefit of the Wife, and either might have had the Action, as in consideration of a Marriage: And here after Verdict, the Husband and she being but one person, she may well enough have the Action. Twisden doubted whether, as this Case is, the Wife may have the Action; but he agrèed the Case of Marriage. Windham conceived no difference after Verdict, but that the Promise in both Cases shall be intended to be made to the party with whom Communication was. Adjornatur.

Philips

Philips *against* West. Ante.

BAldwin moved in Arrest of Judgment, because there is no Inducement that the Husband came to an untimely death, Skelly *against* Pierce, 1658. B. R. You would have been the death of J. S. And Moor Rep. Thou hast procured one to kill J. S. not actionable, Cr. Harper *against* Beaumont. Windham, This doth not shew any act done, but only an intent. But by Foster the common Parlance is understood of actual doing, which Twisden agreed. Laurence *against* Woodyard, Yelvert. Thou didst violently on the High-way take away my Purse. The Rule of Intent to do an act illegal, is not always actionable. Adjornatur. (81) Slander. 2 Cr. 823. pl. 24.

Nevil *against* Cage & Uxor.

THe Husband in Custodia in a Writ, where he and his Wife are named, must appear for himself and Wife, but is not forced to put in Special Bail for her if she be not arrested: But the Sheriff may, upon the arresting him, take an Obligation for good Bail, which by Hern Secondary, is the constant practice of the Court; but he must find Special Bail for himself. (82) Baron & Feme.

Rumsey *against* Boucher.

OF a Servant Maid, She is a common Drunkard, and will go to the Alehouse with any common Fellow, and sit four and twenty hours, and swear damn her and sink her, &c. By which she lost her Service; not shewing she lost any wages, or that her Service was profitable. After Verdict, and this Cause moved in Arrest of Judgment, it was conceived well enough, having a Temporal loss, though the words be Ecclesiastical, per Curiam. (83) Slander.

The King *against* Braughton.

POwis moved to quash Indictment of Extortion against the Keeper of the Gatehouse; 1. Because it appears not he was then Keeper. 2. That the party is not said Prisoner ad tunc, or at any time certain, and so might be before the Act of Indempnity: But the Court refused to quash it till trial of the Fact, because great Complaints had been made of him before. (84) Fees.

The King *against* Evans.

(85) Usury. THe Defendant was Indicted for purchasing Land of a Free-school at 20 l. per Annum, which were worth 60 l. which by Williams is no Offence; which the Court agreed.

Adjornatur.

(86) Slander. SHe is a Whore, and E. D's Whore, not actionable without a Temporal Loss.

(87) Ejectment. NOta, That upon a Judgment against his own Ejector in default of confessing Lease, Entry and Ouster according to Rule of Court, without a Special Rule, no Costs shall be paid by H. the Tenant in possession, that made the default, &c. contrà upon Trial had against H. because the Plaintiff hath the benefit of the Suit, viz. Judgment against his own Ejector, whereby he may recover the Possession.

14 *Car.*

14 *Car.* II. *B. R.* Die Mercurij 9 Aprilis, Anno 1662.

Clerke *against* the Churchwardens of C.

(1) ON Motion for a new Amendment of an Order made for to reimburse Clerke Overseer of the Poor in St. Giles's Cripple-gate, but the former being quasht, the Majority of Justices in Hicks's-Hall (viz. 17.) refuse to grant any new one, because not in their power; but mainly because the Order was grounded only on an Accompt stated by the Oath of the party, and never allowed by the two next Justices: Yet it was urged that such default maketh not void the Accompt, but hath a particular Penalty annexed. 2. That the two next Justices refused to allow it, in which Case the two next must be sought to first, before H. can go to the Sessions; contra in things to be done by two Justices, &c. That the Inconvenience would be great, if not allowed here at the Sessions, the Poor being but ill provided for at best, and now would fare worse. 3. That it was impossible to render an Accompt other wayes then on Oath, by reason of the sudden and necessary Occasions of Expence. 4. That it was more for the benefit than disadvantage of the Parish, for one that is a Baker, &c. to distribute Bread of his own, at the Parish Charge, then to buy it. 5. That there was a Tender made in due time by C.

Poor. Its said the Churchwardens ought to provide in present Exigency, and shall be reimbursed by a Rate. Stiles 246. pl. 562.

Betwixt the Parishes of Eling and Thistleworth.

Friday, April 11.

(2) RESolved by the Major part of Thirteen Justices in Hicks's-Hall Sessions, that H. being a Labouring man, and having an abode at T. goeth for work, viz. to make Brick, with his Family to E. and there dieth, (both T. and E. also being in the same County of Middlesex) his Family shall be kept by T. although his Imployment last longer then that Season, as well as if he had only removed to a Harvest, or such like work.

Poor. 14 Car. 2. c. 12.

DE TERMINO Paschæ,

Foster *Chief Justice.*
Mallet,
Twisden,
Windham.

The King *against* Barkstead.

Siderf. 72. pl. 1. Wednesday, April 16.

(3) Treason.

BArkstead, Okey, and Miles Corbet being brought by Habeas Corpus to the Bar, Mr. Attorney Palmer moved upon the Act of Attainder 25 April, 12 Car. 2. cap. 30. and the Confirmation thereof in 13 Car. 2. removed into the Chancery, and transmitted hither by Mittimus (which he desired to be read) and that they might have Execution thereon without Information, Indictment, or other Trial. The Prisoners only desired Counsel, which the Court refused, until matter of Law shewed by them. Twisden, There is only, that they are not the same persons, or the Kings Pardon pleadable, the Act making all the rest void. 2. Windham conceived the Court should waive the advantage of the Prisoners holding up their hands (because the Attorney General was ready to take Issue that they were the same persons, and to prove it presently) and so it was offered with a modo & forma, which the Court refused, but took it absolutely; and the Oath of the Jury was only to try the Issue, &c. to which no Challenge is allowable, but for special Cause: To prove which Issue, the Evidence was of their sitting in the Court of Justice, and signing the Warrant of Execution of the late King, as against the Prisoners in the Old Baily before: And they being found the same persons, Corbet excepted, That here was no Indictment or Information, as in Sir W. R's Case: But per Curiam they being Attainted by Parliament, they are needless,

In Action upon the Stat. if the party fail, the King cannot sue till apprise by Information or Indictment; *contrà* in Attachment upon Prohibition, or any Offence, *contrà* Coron. & Dignit. 7 Ed. 3. 26. b. pl. 12.

leſs 1 H. 7. Stafford was ſo proceeded againſt; and theſe Proceedings are not new. Alſo by Corber, this Act to this purpoſe is but a Judgment, on which the year and day being paſt, there ought to be a dat Curiæ intelligi: But by Twiſden, A Scire Facias extends not to Attainders by Act of Parliament, as Hut. 21. Sir W. Raleighs Caſe not being grounded on Weſtm. 2. cap. 45. and muſt be of an Offence, (whereas here is none but that of which they are Convict) wherefore Foſter and the Court awarded Execution againſt them; and ſoon after all three were Executed at Tyburn. Execution §. 2.

Brown *againſt* Burdet. Siderf. 74. pl. 4.

Thurſday, April 17.

IN Audita Querela by the Courſe of the Court, the Plaintiff enters into Recogniſance to diſcharge himſelf, if the Suit go againſt him, by Twiſden: But by Hern Secondary, That is only when Execution is ſuperſeded, or the party taken out of Priſon; but if the Money be on the firſt Judgment paid to the party, there is no remedy for it; but if to the Sheriff, the Court upon the Audita Querela may order it to remain there till the Suit determined: If the Plaintiff hath Judgment in Audita Querela, he ſhall only be diſcharged of Execution, but ſhall have no reſtitution; wherefore (becauſe the Plaintiff could not have been taken in Execution on the firſt Judgment, but only upon the Judgment in the Audita Querela) the Court ordered the Money to be brought into Court, and remain till an end made. (4) Audit. Querela.

Matthews *againſt* Raymond. Ante, Debt Br. 43.

Raymond moved againſt a Repleader in an Action of Covenant to pay Money on Articles. The Defendant pleaded payment after the day of 5 l. in ſatisfaction of 50 l. mentioned in the Articles; Iſſue thereon found for the Defendant, who pleaded it, which he conceived ſufficient. But Jones for the Plaintiff contrà, The Action of Covenant was for not payment of Money at a day; After which the Defendant pleads this ſatisfaction, which by way of Accord might have been pleaded in ſatisfaction of the Debt and Damages, but not in ſatisfaction of the Debt, but only in mitigation of the Damages. Allen for the Defendant, This Action is in nature of Debt, a Præcipe, & quod adhuc detinet, ſo that an acceptation after will bar the Action of Covenant, which Windham (5) Amendment. 46 Ed. 3. 29. & 47 Ed. 3. 13. b. In Debt Br. 43. Moor 47. pl. 142.

ham agreed: But by Twisden, the pleading is not sufficient in discharge of the 50 l. But there being a full Issue on an Affirmative and Negative, it is well enough, as it had been by Allen, if it had been pleaded in satisfaction of the Breach of Covenant; and here it doth tantamount, being in satisfaction of the thing Covenanted to be done; and Nichols Case, the Court agreed; but if any Negative and Affirmative be found against him that pleads it, it is good, but not so when it is found for him. Vid. Lightmans Case, Hut. & 2 Cr. Judgment for the Defendant, Nisi.

Jordan *against* Clerk.

(6) Assumpsit. JOnes moved in Arrest of Judgment in Action upon the Case, upon Indebitatus Assumpsit of the Testator, against the Executor, upon promise to pay in consideratione præmissorum, the Plaintiff intending to sue him as Executor; which by Jones is insufficient, which Twisden agreed: And that the Case of Howard *against* Ducket in this Court, was on the same point ruled void, being upon promise if H. would forbear to sue D. as Executor. 2. The Consideration is void without Assets, or being not made as Executor, stayd Quousque first moved on the other Side.

Sir Hugh Middletons Case.

(7) Ejectment. NOta, pro Rege, That Judgment against ones own Ejector cannot be entred till the Postea returned and endorsed, that the Nonsuit was for want of confessing Lease, Entry, and Ouster, which the Secondaries agreed.

Goodier *against* Clerk. Ante.

(8) Leases. FInch Solicitor, for the Plaintiff, that claimed under the Lease for 100. years, The Case he cyted to be C. leased to begin on the Death of W. C. and Martha, on their death without Issue Male: they dye having Issue, which dyeth without Issue, yet this is a good Lease; it is admitted to be so in point of Creation, that it tends to a perpetuity is no Reason of Moment, for the Law shall never construe words of Limitation to make a contingent, which may Commence in point of Estate: So if H. had granted a Rent to Commence when J. S. dyeth without Issue Male, it shall begin when the Issue of J. S. fails, as well as if the words had been so expressed; and yet the objection of the perpetuity would have been the same:

same: and however imprudent provision this be, its not material, if it be good but yet this Lease is Dockable, as Manwood held in the Exchequer, Lessee for years in futuro, or on contingent, cannot falsifie; also this Issue goeth to all; but it might have been otherwise, if it had been on the Death of J. S. without Children, which would not have extended to Grand-Children: Also the words are not on the Death of Issue Male begotten, but also to be gotten, which Refers to all Generations; and this is a proper provision for the Daughters to begin, when the Male line fails, for which end this Lease interposeth betwixt every Branch, and the main Inheritance which is valuable in the preferment of the Daughter, and shall go to her Administrator, though she cannot sell it, nor perhaps may never enjoy it. 7 Car. Keble *against* Hall, Lease to begin within 20. years, or on the surrender of former Lease, here for the uncertainty the Lessee hath Election. Jones for the Defendant, put the Case that H. on the marriage of his Son, makes a Lease for 100. years to begin when the Male-Line of the Son fail, and on that Deed of Settlement, there was a trust for portions to be paid to Daughters, its considerable, whither this Lease be good in point of Creation, or not; being not on the Life of any person, but upon such a remote contingent; but this he admitted now. But the main Question is, upon the words of the Habendum, which he conceived capable of both Constructions; but according to the most common intention of the words, must refer to a dying without Issue at the time of the Death of the Lessor, as according to common Parlans, Pl. Com. 233. though not according to Legal forms, as in Formedon, &c. If H. makes a Will and the Executor thereof dyeth intestate, here (as in our Case) H. may be said in Law to dye intestate, 26 H. 8. 7. but not so in Common Vulgar Speech, Pl. Com. 279. for which Reason this was ruled within the Equity of the Statute. Also the intention of the Deed, doth manifestly shew that it should commence at the Death of the Lessor, being in trust for provision for Daughters then unmarried; and there is a proviso, That if the Males fail within a year after the death of the Lessor, then there were payments to be made to them both, which must else be destroyed: And this is the only Reason to avoid perpetuity, which shall be taken, rather then any other, in equal Construction, which was the Reason of Blunket and Holmes Case to avoid Inconveniencies. Finch, The Case of Executors refusing hath no resemblance in propiety; but by Windham, in point of pleading he is said to dye intestate. Twisden, The sole point here is, what the Devisor meant, and

and Lesse to begin 5000. years hence within the words of the Statute (of future interest) may satisfie, if any future interest may; which Berclay held could not. Windham said, that Rolls was of Opinion, that this Settlement was intended to continue only till Issue-Male had by the Son, at which time the Estate was said setled, and no Clog of Provision for Daughters intended to continue: There was an Opinion certified in a Case referred out of the Chancery to Counsel in this point, 13 Car. 1. Bret. & Pildrim *against* Cole.

Adjornatur.

Barber *against* Winter.

(9) Infant. If an Infant be sued, he shall be in Custodia, and shall not be delivered by Appearance per Guardianum without Special Bail, which the Court said he must find, though he cannot secure them, because as to this purpose there is no difference betwixt Appearance by Guardian and Attorney.

In Detinue Br. 2. Brown *against* Marten.

(10) Trover. Action upon the Case, Br. 111. In Indebitatus, The Defendant pleads delivery of a Pledge, and it was said in a Trover and Conversion, such a Plea is not good. And Twisden doubted here; but being a Special Demurrer, for that Cause the Court conceived it to amount but to the general Issue.

Judgment for the Plaintiff, Nisi.

Fen *against* Driver.

(11) Trespass. Stiles 182. pl. 416. In Trespass, Bugging moved in Arrest of Judgment, being quod 10. Equos ceperunt, abduxerunt, & fugaverunt, by which he lost One hundred Loads of Hay, not saying ad valentiam, nor pretij, which the Court conceived ill, being quod ceperunt, abduxerunt, & fugaverunt; contrà if it had been quod fugaverunt only.

Adjornatur

Frankland

Frankland *against* Savill.

Friday, April 18.

EXamination of witness cannot be by consent of the parties before any Judge that is not of that Court, out of which the Cause went to the Assizes, by Twisden and Foster; because the Depositions are not taken before him, as Judge of Assize, but as Judge of this Court; contrà by Windham: but per Curiam, though one consent to have a Letter read, yet the Jury in pain of Attaint, are not bound to find it; therefore it was agreed, That a Bill should be exhibited in Chancery, and Answered, and Commissioners, by consent, go out thence into the Country to examine such Witness in the Country, whereby the Depositions may come in hither Judicially. (12) Proof.

Frier *against* Hen.

IN Evidence to a Jury, it was observed, That Conveyance to A. for 99 years, if he so long live, is forfeitable by Utlary, and so scarce so good as for life, Remainder to the Feoffees, and their Heirs, during the life of Tenant for Life, yet both do prevent the cutting off the Contingent Remainder to the first, second, or third Sons in Tail; which yet Jones for the Defendant against Cholmeleys Case, prayed to be found especially, but the Court denied it, most Conveyances being this way. 2. One may forfeit, during his Life, and yet the Remainder not destroyed, as Jacobs Case, contrà to Sir John Lydalls. 3. Non-claim upon a Fine levied under usurp'd Powers, confirm'd by the Act of Judicial Proceedings, shall bar, (of Estates sold or disposed by such Powers for any Delinquency against them) but only such as are parties to the Fine, and their Trustees; not such which could not enter by reason of such Powers, and such as might then have entred before, shall not have new five years now, per Curiam, but directed it to be found specially. (13) Utlary. Assurances Br. 1. Dyer 310. pl. 78. such Remainder is in Obeyance.

Braydle *against* Henbrie.

(14) Assumpsit. IN Action upon a promise against an Executor to pay if the Plaintiff would give day per paululum tempus, to sue him for Debt of the Testator. Baldwin moved in Arrest of Judgment, that this is insufficient, as well as per breve parvum, or aliquid tempus: Stayd per Curiam usque.

Bowchier *against* Coster.

(15) Apprentice. March. 3. pl. 6. IN Action of Covenant, Scrogs moved in Arrest of Judgment, shewing the Custom of London to turn over an Apprentice from one to another; and that such to whom such Apprentice is turned, may have an Action of Covenant upon Special Issues on the several Breaches assigned, and verdict for the Plaintiff. 1. That the Breach is quod abstraxit se a Servitio so many Nights, and during that time, did not serve him, which per Curiam being found against him, is good enough. 2. That he did not serve according to his Covenants, whereas no Covenant was made with the Plaintiff, yet if this second Covenant had been omitted, it had been good enough, and the Conclusion, & sic non tenuit Conventum made with the Plaintiff, is as well as could be. Judgment for the Plaintiff.

In Dett. Br. 94. Robins *against* Coxe & Warwick. Ante.

(16) Rents. *Cestuy que use* on lease made could have no Rent unless reserved by Deed, yet the Lease was good 5 H. 7. 5. b. pl. 11. by *Brian*. POwis for the Defendant, moved the Court that the parties were agreed, and had compounded, that no advantage should be taken of arrears, and that the Plaintiff might have Judgment, and the Tenant would pay his Rent in futuro to the Grantee.

The King *against* Trinity-House. Ante.

Saturday April. 19.

(17) Franchis. BAldwin pro Rege in an Information in nature of a Quo Warranto, for digging of Ballast and Lastage: The Defendants pleaded their Incorporation and Grant of that Office, betwixt London Bridge and the High Sea, by the King, which is insufficient, they being a Corporation only capable to sue and be sued, and therefore cannot take Lands of the purchase of a Common person, nor of the King 2 H. 7. 13. by Keble, 21 Ed. 4. they being but a Corporation to the particular

cular purpoſe and they cannot here be to other, becauſe no Rent is reſerved. 2. It is not ſaid to be an Auncient Office, and no uſitatum by ſuch as enjoyed that Office can be pleaded; ſo Dy. 76. Iſams Caſe; and to ſay that the King and Quéen of England, time out of mind, have had the grant of ſuch Office, is but an Implication, and impoſſible to be true, Quéen Elizabeth being the firſt Grantor of it: but the preſcription ſhould have béen annexed to the Office, &c. that Quéen Elizabeth, and all her Predeceſſors, Kings and Quéens, &c. 3. This priviledge to digg in the River, ought to be alledged to be ratione officij, and as appendant to the Office (admitting the Office to be ſufficiently pleaded) for this cannot be parcel of, nor an incidenc inſeparable to the Office; and therefore can be only appendant, 1 H. 7. 29. and muſt be ſo pleaded, and not that they have uſed to digg generally. 4. Admitting it be appendant, nothing paſſeth out of the King by this grant (of the Office Laſtage and Ballaſtage) without ſaying cum pertinentijs, being a thing of conſiderable profit 8 H. 7. 4. Dr. & St. 35. 5. The Information is, that the Defendans, without Warrant, have uſed to digg in any place of the River betwixt the Bridge and the Sea: the Defendants ſay, that by Virtue of this Grant they might digg in aliquo convenienti loco, which (not ſhewing in what place) is inſufficient, ſed non allocatur, the King having demur'd thereon, this is a diſclaimer in all the reſt. Alſo it is ſaid, that all Grantées of the King and this Office have uſed, &c. which is not good, no preſcript being to be layd in leſſée at Will 7 Jac. Sir Thomas Grimes *againſt* Peacock, B. R. no more then every Tenant may preſcribe for Common, becauſe no interruption ought to be. Allen for the Defendant, by the very Conſtitution of a Corporation by the King, they are made capable of this grant, and they have appeared as a Corporation; alſo the grant of this Office is only deſcribed by the uſitatum, the Liberty and Office being the ſame thing, and therefore is not neceſſary to be ſaid appurtenant to the Office, it being doubtful, whither it be an Office or not: Alſo none can aſcertain which are convenient places, by reaſon of the accidental riſing, and full of the Sand; alſo the form of this Grant is not as to the Corporation in their own Right, but only interprets the right in the Kings Grant by the Uſage, but the Record being, that they ſhould be a Corporation by ſuch a Name, and that they might ſue &c. the Court conceived it well enough; and though the Office be only to ſurvey the Ballaſt, and order the Wharfs and manner of the Landing and Dying it, and by the Attorny General may be without Digging the Ballaſt, which is a profit, a prejudice in anothers Soil; yet Twiſden

March. 16. pl. 38. and Windham, conceive this an incident inſeparable to the grant of Laſtage and Ballaſt, as Spilman Glos. verbo Laſtage. Howel proRege, conceived this Office only of Superviſorſhip. Foſter ad Idem. Poſt. Adjornatur.

Siderf. 37. pl. 3. Windebank *againſt* Bear.

(18) Office. Vidan 87. AFter demanding the Tenant (which muſt be the day of the retorn of the Writ) then the Aſſize muſt be Arraigned, then the Count is to be read, by Twiſden, but by Windham the Plaint is only made generally of his Freehold, then the Tenant demands Oier of the Plaint, Writ and Retorn, then day may be given, and then the Court may be made ſpecially: And if it be of a Rent, the Title muſt be in the Plaint or Count which is all one, and the reading of ſuch Count in Latine, is that which entitles the Court to Juriſdiction, and if no ſufficient entry be made of ſuch Plaint, ſo read all, is diſcontinued, yet when the Writ is Retorned the Court, (without any Entries) may adjorn the Aſſize from time to time, without calling the Recognitors till Iſſue joyned, and may enter all as of the firſt Term, though no Count be then made. Poſt.

(19) Baron & Feme. IN Action upon the Caſe upon promiſe made to the Plaintiff to make a Feme worth 500 l. if the Plaintiff would marry her. Newdigate moved in Arreſt of Judgment, that the Action ought to be brought by both or by her to whoſe benefit it is, which the Court denyed; and that the promiſe is only for the benefit of the Plaintiff as the Caſe of Sprat *againſt* Agar. Judgment for the Plaintiff, Niſi.

Monday April. 21.

(20) Indictment. NOta by Twiſden, No Indictments, but ſuch as are removed out of London are here amendable, and they are ſo, becauſe they by Charter retorn only tenorem Recordi.

Fourd

Fourd *againſt* Weſton in Demiſe, Br. 8. Siderf. 73. pl. 2.

1 Sid. 73. S. C

(21)

AFter a Deviſe made to H. to ſay as in Kites Caſe Dy. 310. b. I will ſettle my Land on another, or to ſay, that He hath made no Will, as Jeoffryes Caſe, or to ſay, that J. S. ſhall be my Heir that is not ſo at Common Law, is no Revocation; but if he were Heir it may be, or not be, (as in 20 Car. per Curiam was reſolved) but if H. take notice of his Will, but that J. S. is his Heir and ſhall have it, is good Revocation, by Twiſden & Curiam, and in the Caſe at Bar, the Deviſor ſaid without reference to his Will, that his Heir at Law ſhould have his Eſtate; which Foſter conceived a Revocation, being ſpoken to a perſon that knew of the Will; which Twiſden denyed, without deliberate taking notice of the Will. Verdict for the Defendant that the Will was revoked, if any.

Deviſe. Stiles 201. pl. 657. 2 Cr. 115. pl. 5. Goldsb. 33. pl. 7.

Weſt *againſt* Philips. Ante.

WIld conceived the words (you ſet on folks to Murder J. S.) Actionable, Fine and Impriſonment being due without averring J. S. to to be dead, 1 Cr. 140. pl. 147. of Leukner *againſt* Crutch, for the words are Scandalous, as that my Lady Cockain offered Money to give her poyſon to kill the Child in her Body. Twiſden, if it be Criminal to charge H. with fact done, as that he is a Barretor, though only Fine and Impriſonment be due, yet it is Actionable; and this is pregnant in it ſelf, that the Husband was Murdered; Cronye *againſt* Prat, 1653. B. R. there was a Man Murdered in your Houſe, and you conceald the Murdered; which by Twiſden Counſel, ſuppoſed a fact done; alſo the Caſe at Bar is the Husband tunc defunct. which ſuppoſeth him dead, and by Foſter no good Senſe can be put on theſe words, and you ſet on Rogues to Rob me, hath been adjudged Actionable. and the words implye that he cauſed the Husband to be Murdered.

Judgment for the Plaintiff.

Slander.

In Diſms, Br. 11.

NOta, that Tryal whither Land of which Tythes are ſued for in Spiritual Court is Barren and not arable, muſt be at Common Law, and Prohibition awarded accordingly.

Tythes. March. 50. pl. 87. Infra 238. pl. 300.

Pal-

Palmer *againſt* Hams.

(24) Fees. Pl.Com.415.b. IN Aſſumpſit to pay the Goaler Money due for Fées. Allen after Verdict for the Plaintiff moved in Arreſt of Judgment, that it was not averred that the Money due and promiſed was for Fees, Sed non Allocatur, but Judgment for the Plaintiff, the Record being upon View for Fées, alſo his Bare Fee about 6 s. 8 d. or 13 s. 4 d. of each Priſoner, which is not taken away by Statute.

The King *againſt* Tymberly. Ante.

Tueſday, April. 22.

(25) Conſpiracy. So conſpiracy lyeth for procuring H. to be Indicted of Common Treſpaſs 3 Ed. 3.19.pl.34. BArwelt moved in Arreſt of Judgment, for that matter of the Indictment, it being to deprive the Plaintiff of his Credit, and to extort ſeveral Sums of Money from him; but ſaid not that they charged or conſpired to charge the Plaintiff before any that had Juriſdiction; and as Poulters Caſe, by the Common Law, no Conſpiracy lay till after acquittal; but doth now lye for a Conſpiracy to Indict; but it muſt be ſuch as may draw the party in peril, and this is the deſcription in the Statute of Conſpirators, 33 Ed. 1. 3 Inſt. and the Reaſon of that ſevere puniſhment againſt them. 2. This is not matter of Slander 1 Cr. Salter *againſt* Brown, nor would be Actionable, unleſs for matter that were determinable by the Ordinary, 2 Inſt. 206. Windham, the Crime is the Conſpiracy, which whither it be only to defame, or diſgrace men, or had it bèen to charge him with Hereſie, it had bèen puniſhable by Common Law, though no proſecution be had thereon. And by Twiſden, this is no Indictment for having a Baſtard, which is ſeldom, but is a Conſpiracy for lucre and gain, to charge and diſgrace one with a Baſtard, which is well Actionable: Mallet ad Idem, Corporal puniſhment being due: And by Foſter, the very Act of conſpiring is ſo odious, for the ill conſequences, that it cannot have good intent. Judgment pro Rege.

Tows

Tows *againſt* Lewis. Ante

IN Account, if H. be removed out of London, or Inferiour Court, albeit Special Bail be below, yet here he puts in Bail only to be in Cuſtodia, but after Judgment quod computet, a Capias goeth forth, and when he is taken, he muſt put in Special Bail. 2. Mainpernors to anſwer the Condemnation; but he ſhall not (as was before ſuppoſed) put in Special Bail on the firſt appearance to Anſwer the Condemnation, by Twiſden & Curiam. (96) Account. Williams *againſt* Lowe. Noy 28. pl. 113. *Green* and *Dickinſon* that it is in diſcretion of the Court to do either at firſt or laſt.

Shepherd *againſt* Wakeman.

poſt. 269. 308. 1 Lev. 53.

IN Action upon the Caſe for writing a Letter to her, as Sweetheart, whereby ſhe loſt her Marriage with J.S. The Letter bore date in the middle of that Term, when the Action is brought; which, per Curiam, if it be before the Bail filed (which may be of any Return of the Term, but is uſually of the laſt) is well enough, but contrà if after. 2. The Defendant claimed the Woman as his Wife, and therefore though it is found by Verdict, that the Defendant falſly and malitiouſly affirmed a precontract, yet the Defendant making Title, it is not Actionable; Mildmayes Caſe, Baniſter *againſt* Baniſter, Sir Gilbert Gerrards Caſe; elſe by Twiſden, none can ever make his Title, if when it is found, that he made it falſely he ſhould be ſued. Judgment ſtayd, Quouſque. Poſt. (27) Slander. 12 Co. 35. Hub. 62. pl. 13. it may be ſo to the party. 337 pl. 444. Simile.

The King *againſt*. . . . . .

INformation on 5 Eliz. 4. for uſing the Art and Myſtery Mercatoris, Anglicè a Mercer, which by Lindly is ill, the Trade of a Merchant being not within the Statute; and it hath been doubted whether a Mercer or Draper be within the Statute, and then the Anglicè will not help it: But by Twiſden, Information in B. R. on this Statute being in Derogation of the Common Law, may be quaſht on Suggeſtion; but others removed out of inferior Courts, cannot be ſo, without Demurrer. Adjornatur. (28) Trades. 38 pl. 54.

Neve

Neve *against* Nelson. Ante.

(29) Priviledge. THat all the Clerks of the C.B. trahi non debent into Suit, else where is Negative pregnant, Levingston *against* Crumpton, Clerk in Chancery, and Foster *against* Barrington, by Twisden in B. R. and this Plea ought, as hath been resolved, to be amended, if pleaded; though if one bring in the Book of the Eschequer, it is sufficient without averment, which the Court agreed, and awarded Respond' ouster.

Spencer *against* Monke.

(30) Error. Stiles 174. pl. 401. 8 Co. 143. Dr. Druryes Ca. & Error Br. 150. IN Error on a Scire Facias upon a Judgment against J. S. the Principal cannot assign Error against the Bail, though it be as well against himself, as in Execution against the Bail, per Curiam: Also the Judgment against the Principal was, that it was awarded that the Plaintiff do recover, which was moved by Baldwin to be Error; and so held per Curiam.

The King *against* Randall.

(31) Nusance. GRaves moved to quash an Indictment of Nusance for Building of a Barn in & super Altam & Regiam viam, not saying whither leading; and as Claydons Case, 1 Cr. the Barn cannot be upon the whole way, but his chief Exception was, that here is no Offence, being quod per quandam structuram incroachiavit, which per Curiam is well enough: But by Twisden, the not shewing whither the way tends is material: But by Foster, first take Issue on the Nusance, or have a Certificate that its removed, else no Exceptions to the Indictment are allowable; else by Twisden, the Justices must certifie that its no incroachment, till when the Court would hear nothing.

Stiles 356. pl. 760.

But Process may be stayed without. 122. pl. 144.

Hunt

Hunt *againſt* Hazlewood.

H. 2 Car. 2. Rot. 849, 850.

IN Aſſumpſit laid ſeveral wayes for ſeveral Sums of Money, the toto ſe attingunt was more, but the Jury in one found leſs then the particulars; which by Wild, Recorder, for the Defendant, is well enough: But the other Action being in toto ſe attingunt more than the particulars, and the Jury find the Sum computed, this is ill; which difference, by Twiſden, was agreed by Roll upon peruſal of ſeveral Caſes in Jones and Barclay's time: But Allen for the Plaintiff, cited Syms *againſt* Gregory, where a repugnant Treſpaſs (as 20 H. 6. with continuando beyond the teſt of the Writ, and the Jury give Damages for all, it is intended that they only give Damages for that which they lawfully may, and ſo were the Reſolutions in Parmiter *againſt* Creſſet, Trover pro Duodens fili, Damages were affirmed well given, though it be Nonſenſe: But by Twiſden, no Jury can believe Treſpaſs can continue after the Writ brought; but this doubt ariſeth on their belief of a Sum which is miſcaſt, and ſo the difference is evident; and three or four Caſes have been thus adjudged, which the Court agreed, and gave Judgment for the firſt, and adjorned the laſt. (32) Amendment. 2 Cr. 569. pl. 8.

Fen *againſt* Driver. Ante.

THe Treſpaſs being for taking away 10 Equos, by which he loſt One hundred Loads of Hay (not ſaying of what value the Hay or Horſes were) but concluding generally ad valentiam 100 l. which was found by Writ of Enquiry of Damages; the Court conceived it to be ill, the Action being not brought for the taking away the Horſes, but for the loſs of the Hay: But they agreed, that after Verdict this had been helped. Adjornatur. (33) Treſpaſs.

Devereux *against* Underhill.

Wednesday, April 23.

(34) Amendment. IN Trespass of Assault, Battery, and Wounding, the Roll of Jurata, which begins Ponitur in Respectu, Quousque, &c. this is right; but the Distringas was returnable at a Day after the Assizes, which as 1 Cr. 138. by Newdigate for the Plaintiff, is well enough, and at most but a mispriision of the Clerk, P. 2 Car. 1 Cr. 32. Smith *against* Wade, which the Court now, after Verdict, may amend in a Quo Warranto, 1 Cr. 146. which is out of the Statute, this Case was held amendable: And by Twisden, the Jurata is the chief Warrant, 1 Cr. 175. though not the sole Warrant of the Judges, who have power by West. 2. and by all the Presidents and the Practice of the Court, the Distringas, which is only si Justiciarij prius venerint, but is no Nisi prius of it self, is amendable after Verdict, as well as the Jurata shall be amended by the Distringas that is before, à Fortiori, the Distringas that cometh in after by the Jurata before, which the Court agréed. Judgment for the Plaintiff.

Stiles 8. pl. 17.

2 Cr. 239. pl. 4.

In Escape Br. 32. The King *against* the Mayor of Hereford.

(35) Return. ON Rast. Entries 580. Not Guilty may be pleaded to the Sheriffs Return of a Rescous, by Moreton for the Defendant, which the Court denied; but agréed, That in Action upon the Case for the Rescous one may Travers, &c. 2. If one confess Contempt or Perjury, he shall have Judgment presently, without further Examination on Articles. Post.

Siderf. 74. pl. 5. Whitchurch *against* Paget.

Entred M. 13 Car. 2. Rot. 222.

(36) Office. IN an Action upon the Case for taking the Profits of the Under-Clerk of the Treasury, whose admittance was usually by the Master of the Office, and Fees ancient in a Table under the Judges hands, 18 d. every Præcipe, and not removeable at the Masters pleasure, nor at the Judges. 2. Petitions to this Court are seldom signed by the party himself, as they are to higher Courts, per Curiam. The Defendant relied on, that this is no Office though the Fees be certain, but

Stiles 208. pl. 471.

but only an Imployment at the Masters pleasure, and all the Admission is only the Masters permission of him to work, without Rolls or Grants. 3. A Note obtained by the Lord Finch, Master of that Office formerly, of the Officers Subscription, that they were but Servants, which by Allen for the Plaintiff, is no more then some Parishioners Subscription to pay Tythe in kind which will not bane others; which the Court agreed, and refused to give it in Evidence, especially part being cut off. 4. Though this be no Office, 29 H. 6. the Duke of Norfolk in Reynolds Case, 10 Co. yet its such an imployment which is allowable by the Court, and to be placed on men of Ability, whose defalt shall not prejudice the Master, nor can he remove them without cause; they must first serve a Clerk, then are admitted by the chief Justice by allowance of the Prothonotaries, which must be after they have served their time, unless cause be to the contrary; and though the Office is not forfeited by defalt of the Clerk, yet the Superior may be fined for it. 5. Money given to an inferiour Clerk to resign, is not within the Statute, by Twisden, not being bought of the Master; and these Offices are particularly excepted in the Statute. 6. It was moved for the Defendant, That the taking of the Profits, being by colour of an Ordinance disabling the Plaintiff, being a Delinquent, was pardoned by the Act of Oblivion, 12 Car. 2. But by Allen, the Act relates only to publick differences, or such private injuries as were done under colour of, and relating to them; and it doth not appear that the Plaintiff was a Delinquent: But per Curiam, this being but an Ordinance, Jan. 43. notice thereof must be proved; and by Twisden, the Act extends only to indempnifie such as received Rents of Delinquents, and paid them over to the State, 25 Dec. 1643. The Court conceived it an Office, and that the Master could not turn any out of it, and directed only as to Damages, which by Verdict were given to 600 l.

Lawrence *against* Warbeck.

Thursday, April 24.

(37) Court Baron. UPon Affidavit that the Debt was above 40 s. and divided into several Actions in Court Baron, the Court awarded a Prohibition and an Attachment, unless cause be shewed.

(38) Visne. THe Visne cannot be altered after Plea pleaded, but only by consent on motion in Court, and then the parties pleaded de novo, per Curiam.

Brown *against* Barnet. Ante.

(39) Audit. Querela. BY Windham, By Judgment in Audita Querela brought before the former Execution done, H. shall be restored to whatever he lost by Execution, which the Court agreed, being founded on a Release, F. N. B. Adjornatur.

Weston *against* Hortall.

(40) Prescription. Avowry, F. 66. IN Action upon the Case, the Plaintiff counted that he was seised of Mills, and that the Defendant and Occupiers of such ground (not saying by what reason) ought to repair a Wear, by not doing whereof the Plaintiff lost the benefit of his Mills; which by Jones, in Arrest of Judgment, is ill; but especially because the Prescript is laid only in Occupiers, 5 Co. 99. which may be Tenants only at will. Adjornatur.

The King *against* ; . . . .

(41) Indictment. HE By pretence of concealment of an Offence in Leather by a Tanner, contrà legem penalem receiveth Money, as also not to prosecute, being an Informer, for which he was Indicted; which Winnington prayed might be quasht, no offence being alledged: And not concluding contrà formam Stat. Twisden conceived it a strange Indictment, but being after Verdict, Adjornatur.

Glascock

Glascock *againſt* Morgan, in Debt Br. 49.

(42) Judgment. Error, Br. 117.

After Curia adviſare vult, by Allen, the Judgment might be entred of the ſame Term the Verdict is given, though the party be dead, as in Waldron and Wards Caſe; which Foſter agreed to have been done, as well in this Court as in C. B. and by Hern Prothonotary, as the common Courſe; but otherwayes where the party by his voluntary act defers his Judgment, there it ſhall be entred only of that Term when its prayed; or if the Defendant ſtay it by Injunction, if Rules be given to move in Arreſt of Judgment on the Poſtea, the Plaintiff may enter his Judgment, as of the Term when the Verdict is given; ſo on Special Verdicts which are continued by Act of the Court: Whereſore Wild for the Defendant prayed that the Elegit, being executed, might be returned and filed, that ſo no Capias might be after award, which the Court granted. Poſt.

So of *Fieri Facias*, 1 Ed. 3. 11. b. pl. 23.

Warner *againſt* Brotherton.

Entred Hill. 12 Car. 2. Rot. 708.

(43) Executors. 2 Cr. 15. pl. 20.

IN Action of Debt againſt one as Executor upon a Judgment againſt the Teſtator; ſhe pleaded that ſuch a day (which was) that Adminiſtration was committed to her, which on Demurrer after Imparlance, was by the Plaintiffs Counſel conceived to be ill. It hath been objected, becauſe in ſubſtance it is no more then ne unque Executor, which is not in Bar, 7 H. 6. 36. per Goddard, & 37 H. 6. 24. per Davers, and therefore cannot conclude in Abatement, and the Matter, not the Concluſion, denominates the Plea; yet by him this is but a Miſnomer of the perſon, as Robinſons Caſe, 5 Co. 32. & 35 H. 6. 21. b. the word Executor being parcel of the name, and traverſable, 35 H. 6. 55. which ſheweth it ſo to be: And this Plea differs from unque Executor, confeſſing her ſelf chargeable with the Debt, but not in that manner, 21 H. 6. 19. But admitting the Pleas to be alike, yet the Concluſion doth reſtrain the Election to one way, 36 H. 6. 18. per Littleton, 3 Ed. 3. 46. 37 H. 6. 24. And ſuppoſing this a Plea of Miſnomer, it cannot be pleaded by Attorney, being contrary to his Warrant, F. N. B. 27. A. 2 H. 6. 11. 6 H. 7. 14. 32 H. 6. 30. Montenure after the view may be pleaded, but not after Imparlance, 19 H. 6. 1. & 2. Yelvert. 15 Jac. 112. 32 H. 6. 27. & 28. 35 H. 6. 36. H. 2 Car. Ratcliff *againſt* Bucke, Owen;

Stiles 385 pl. 836.

en; & Latches Rep. But this Plea demanded Judgment de Billa, and began not actio non, which by Twiſden is but in Abatement; which Windham agreed; and ſo cannot be pleaded after venit & defendit vim & injuriam, which is general Imparlance. But per Curiam, the Attorneys Authorities are now general by the parties name, without any addition of Executor; but in the Old Book the Warrants of Attorney were filed together with the Pleas, which is not now uſed.

Adjornatur.

Callop *againſt* Metham.

(44) Error. Of Leſſee in B. R. is aided, 35 pl. 157.

VEnire Facias upon Iſſue in Inferiour Court, being of 24. is Error per Curiam, ſo Judgment of Debt, and Damages, and Coſts de bonis teſt. ſi, & ſi non, de bonis propriis againſt Executors, upon Plene adminiſtravit found againſt him is erroneous; contrà of ne unque Executor upon Aſſets of 20 l. found, the Debt being 22 l. whereas only Damages ſhould be againſt the Executor, Si, &c.

The King *againſt* Brewſter.

Friday April 25.

(45) Perjury.

JOnes ſhewed cauſe againſt Judgment upon Indictment of Perjury on 5 Eliz. becauſe it doth not appear how the Oath made was material to the point in Iſſue; ſaying only quod Defendens, being teſtis productus in Aſſumpſit, to pay all ſuch Sums of Money as the Plaintiff ſhould expend, in conſideration he would bring an Action, Iſſue Non Aſſumpſit; the Oath was, that the Plaintiff received mony paid by the Defendants Servant in diſcharge of all Actions; but by Twiſden, though this be not direct to the Iſſue, yet it is material to the end of the Action, which is to recover Damages: And by Twiſden this payment being before the Action brought, may be pleaded in Bar; but however it is material per Curiam. 263. pl. 47.

Henly

Henly *against* Cottington.

IN Evidence to a Jury at Bar in Ejectment, the Defendant claimed by 3 Jac. cap. 5. §. 17. because the Lessor of the Plaintiff, (viz. his Son) was gone beyond sea with a Popish Priest without Licence, but it appeared that he went several times, some whereof were pardoned by the Act of Oblivion, and once after he had Licence which cost 6 l. 6 s. 8 d. But Twisden conceived the interest, vested by this Crime in the next of Kin taken away by the Act of Oblivion, which was of as high nature as the other Statute: Also the King hath not an Interest, but as 13 Eliz. 3. of Fugitives hath a perception of profits, which upon Return is gone. Windham, doubted; also he conceived that any other Cause is not meant of any what ever, but only of Causes like the first, to prevent his Education. The Court enclined to a Special Verdict; but by consent of parties a Juror was withdrawn. (46) Pope.

The King *against* Brewster. Ante. 262. pl. 45.

A Second Exception to the Indictment was, that to the Assignment of one Breach in the paying, &c. the year of our Lord was omitted, which by Curiam is amendable being out of London. But 1661. being in, it is well enough. Judgment pro Rege. (47) Amendment.

The King *against* Peache. In Error Br. 186.

DEfendant was Indicted for using the Trade of Woolen-Draper, the Caption whereof was before Justices of Assize, who by Windham have no Power to take any which the Court agreed on, Naylor *against* Ash, 5 Eliz. 4. §. 32. but if they had said of Oyer and Terminer, it is well enough, being within the words, Any other Justices, as well as on Informations, for the forfeiture on any such Law, as Indictments; for by Twisden the Justices take things promiscuously, but the Clerks must certifie by that power whereby they take it; Or else generally naming all their powers: And it was Quasht per Curiam, and a Fine ordered on the Clerk of Assize of 40 s. (48) Trades. Stiles 228. pl. 518.

Young

Young *against* Collet.

(49) Aud. Quer. THe Court refused to Bail one in Aud. Quer. as well when the party is in Execution, as where he is not taken, unless he shew some Deed of Release, &c. And here the Defendant prayed a Supersedeas in Audita Querela to prevent his being taken upon pretence that the Assault and Imprisonment, on which the Judgment is grounded, was by virtue of the Act of Oblivion, and Commissions from Commissioners of Excise, which the Court would not grant, but conceived it a Supersedeas of it self, the party not being in Execution; (which by Hern Secondary, is not usual by the Course of the Court without Deed:) But the Court take the Bail to prosecute the Audita Querela cum effectu, which must be. Post.

Rimpe *against* Harrison.

(50) Arbitrament. IN Debt upon a Bond to stand to an award; Defendant pleaded performance, Plaintiff replyed non-payment of money, as Parker *against* Taylor 1 Cr. 93. Defendant rejoyned, that he hath not paid; which by Twisden, is a Confession of a Breach; 9 H. 6. 37. and so Judgment ought to have been for the Plaintiff: But by Powis for the Defendant, that is intended on Demurrer on the pleading; but here is no Issue joyned, and so the Verdict assessing Dammages, is void; though had Dammages been releast, the Plaintiff might have had Judgment, or else the party might have had a Writ of Enquiry of Dammages: But Twisden doubted, that now this Verdict shall Tantamount. Adjornatur.

The King *against* Timberly. Ante.

(51) Conspiracy. JUdgment given that he stand in the Pillory in Cheapside from 10. to 12, with a Paper writ on it, for false Conspiracy, and fined 50 l.

Tem-

Temple *againſt* Fotherly.

NOta, per Curiam, if a Record be cut off, the File torn or imbezzled, the Court on Examination of the Original, and remembrance in the Office of Cuſtos Brevium, and Attornies, may renew it. (52) Records.

The King againſt the Mayor of Hereford. Ante.

Saturday, April 26.

REſtitution cannot be by the Court, before they are poſſeſt of the Record by Return of the Writ of Error by the Clerks; but per Curiam, they may do it when H. on a Contempt comes in and confeſſes the injury. Ante. (53) Reſtitution.

In Denizen Br. 7. Collingwood *againſt* Pace. Ante.

IN the Exchequer Chamber, all the Judges (but the Chief Baron) being preſent, in Ejectment, Archer Serjeant for the Plaintiff, for the diſcent againſt the Eſcheat, Poſtnati 25. this is Quæſtio Juris, as Ratcliffs Caſe, & Pref. to the 2 Rep. which is in our Law certain; 1. As conſidered without the act that the Brothers, Engliſh born of Alien Parents, ſhall inherit each other; the Objection that there are elder Daughters hinders not the younger, Dr. & St. 13. Deniſes 7. Diſcent 57. but otherwayes of an Attaint which is not out of the conſideration of the Law, as the other is, Entr. Fitzh. 7. Stanford 95. 27 Ed. 3. 77. 21 H. 7. 31. per Frheux; nor ſhall the Heir of him that is an Alien hinder, 17 Ed. 4. 1. 20 H. 6. 43. Stanford 58. 1 Cr. 151. becauſe he cannot make his Pedigrée, Dyer 274. which he muſt do to take any Eſtate; but the ſingle point is, whether the Brothers may inherit each other, Pl. Com. 303. Pl. Com. 455. which he conceived they ſhould, the eldeſt Brother being as much obliged by Nature, and the Law of God, to comfort his younger as the Father the Son, 27 Numb. 8, 9. Ratcliffs Caſe, Pl. Com. 445. How far Blood is neceſſary is conſiderable, it muſt be intire, 1 Inſt. 7. and of lawful Marriage, but is not neceſſary to be as well by Father as Mother, but any one will ſuffice to convey the diſcent betwixt Brethren in caſe of Purchaſe by either of them, 13 H. 7. 7. b. Stanford 195. 1 Inſt. 84. ſo is 2 Cr. 601. Bacon & Bacons Caſe, & Denizen Br. 21. Abr. Aſſ. 39. b. The Verdict doth not find of what woman he had Iſſue, 1 Inſt. 198. Raſt. Entr. 252. b. (54) Alien.

therefore it shall be presumed she was English, for iniquum Jure non est præsumendum, but its found the Issue is of Scotish Parents; yet by reason of the constant and usual Amity betwixt the Nations in King James's time, therefore Postnati 9. such born in one, as well as the other Realm, are declared to be inheritable since Queen Elizabeths time before the Union: And the Objection 1 Inst. 8. is answered in 2 Cr. Godfrey *against* Dixon, there is here natural Blood, whereby one conveys his Pedigree, which is sufficient without inheritable Blood, which is only to make title, 2 Cr. 685. every man hath a personal and an auncestrel Blood, 49 Ed. 3. 9. Pl. Com. 447. and the natural personal Blood is the foundation of the legal, F.N.B. 195. 8 H. 6. 2. Entr. 435. and so the Father need not be here mentioned, Co. Entries 328. F.N.B. Pref. the Jus duplicatum is only meant of the natural, not of the inheritable Blood, Pl. Com. 357. that they have the same Father and Mother, which doth disable only when one makes title from them, 8 Co. 72. 9 Co. 139. Dyer 357. 332. 5 H. 7. 33. Hub. 259. but especially Hub. 332. Mackwilliams Case, 1 Cr. 524. Edwards *against* Rogers, are full to this point, 1 Cr. 543. also Hobbies Case was adjudged, that the Attainder of the Father hinders not the Brothers, as was also adjudged in Barons Case, in temps Eliz. in Hobbies Case, after Error brought, and six Adjournments, there was a Non prosec. entred by the Attorney upon another title, as Altonwoods Case started for the Queen, which hath been reputed a hard Judgment, Tr. 37 Eliz. Rot. 199. as to the Naturalization, 1 Inst. 129. being of an Alien in Amity, its more on policy to enable him to traffick, then to take off any disability, 5 Co. 52. Dyer 283. 7 Ed. 4. 30. 10 H. 4. 26. for such persons may purchase and maintain an Assize, and his Lands shall discend till an Inquisition found, 1 Cr. 9. so far the Law takes notice of his Blood to be true, and not corrupt or disabled, Tr. 9 Jac. B. R. An Alien may have Action for Slander, 7 Jac. cap. 2. Naturalizations are Acts of Grace, and so to be taken liberally, being but a Restitution to those Capacities which are restrained for Reasons of State, 3 Inst. 241. that they shall, to all purposes, be made natural Liege People, are operative words to this purpose, and may do any thing that two Brothers born in England might, Pl. Com. 130. 3 Inst. 242. and the contrary would be of ill Consequence, and against the Publick Faith of the Nation. The Duke of Lenox's Case, he was naturalized, and the Lord Aubeny likewise; and though their Auncester was Antenatus, yet they enjoy to this day upon this point, as was said by Sir John Davis in the Arguent of Godfry *against* Dixon; which Case, though

though the Father were a Denizen, doth not alter it from this. 7 Co. 7. 1 Inſt. 8. 129. 22 H. 6. 38. Denizen Br. 9. They are like two Grafts on a wild Stock, which concockt the wild Sap into their own Nature; or like Branches of a Candleſtick. Stiles 139. pl. 31.

(2.) Finch for the Defendant, The difference betwixt Alien and Attainder is denied, 22 H. 6. 38. yet he agréd the Caſe only, that the Sons of Aliens cannot inherit each other: He agréd, that the Children of an Engliſh woman are as lawful Iſſue, as if the Father were ſo. And here it cannot be preſumed ſhe was Engliſh, becauſe its found that the Iſſue was Alien born: And as to the Act of Naturalization, nothing therein puts them in better Caſe, then if they were Subjects born, this being but an imitation of nature; wherefore Baſtard & Mulier, or Brothers of the half Blood, cannot inherit by ſuch Act: And the words of the Act are in reference and ſimilitude, and can have no other conſtruction, then that they ſhall be like Engliſh Sons, born of Alien Parents; the intent of the Statute being not to create any new courſe of diſcent, but to take away his perſonal defects; and the Clauſe of reſorting to any Anceſter, concludes as any born in England might do, and ſo are méerly redundant. In ancient times the method to introduce Aliens was by Letters of Denization, which were after confirm'd in Parliament, as 8 H. 4. numb. 99. Davis, 2 H. 6. numb. 31. Jaques and the Dutches of Bedford, 1 H. 5. numb. 17. Rice ap Thomas, 2 H. 5. divers others were naturalized without any Denization, 3 H. 6. 55. and this Term is not mentioned in any old Book, nor before Calvins Caſe, yet was the benefit then as great as now, 24 Eliz: Hye *againſt* Hill, 3 Cr. 3. 1 R. 3. 4. 22 H. 6. 38. Iſſue of Engliſh Parents born beyond Sea, after licence expired, ſhall inherit the capacity of an Alien; but being born of an Engliſh man, is not alike with this at the Bar, yet is the Act in the ſame form; theſe Acts muſt be taken ſtrictly, 50 Ed. 3. Petitions, numb. 204. being againſt the Liberty of the Subject, Strangers being Spies, 1 Rich. 3. cap. 9. (doubted whether repealed by 1 H. 4.) Hut. 132. yet always expounded againſt the Alien, Harmon *againſt* Jacob, 1650. & Tr. 55. in an Indictment againſt Petit a French Taylor, 18 H. 6. Roll of Parliament, numb. 29. becauſe they are preſumed to have animam revertendi, P. 3 Car. Gret *againſt* Wood in Exchequer, the Son of an Alien of the firſt diſcent, born in England, ſhall pay double Cuſtom. We do allow Aliens to Traffick, and gain perſonal Eſtates, and diſpoſe them by their Wills, but they have no favour when they purchaſe Dy. 132. b. pl. 79. A. & B. *ut Superviſores* let, &c. Stiles 256. pl. 581.

Lands; and this is different from an Act of Reſtitution; which laſt hath ſome merit, the other none. Naturalizations in France, by reaſon of the great Fines the King there taketh, which are the tenth part of his Eſtate, is much favour'd, but not ſo in any other Nation. 10 Car. All the Antenati in Scotland are naturalized in Ireland, which doth not extend to England; yet natural Birth in either Nation giveth Capacity in the other. The Arguments taken from Nature make nothing for the Plaintiff, becauſe there are elder Brothers; but all Inheritance betwixt all perſons is grounded on true and legal Conſanguinity, natural without legal being not Jus Conſanguinitatis, but call'd ſo, having no legal root; and where the Brothers could never inherit the Father, they ſhall never inherit each other; for if there be defect in the Root, Brack. 64. there can be no Capacity in the Branches, Rom. 11. The diſability ex culpa ſuppoſeth natural Blood, but the Root is corrupt by Attainder: So if Baron & Feme have Iſſue, and then are divorced cauſa præcontractus, the Iſſue cannot inherit each other, none can diſtinguiſh the whole from the half Blood, or compute the degrees of Colinage, but by recourſe to the common Stock, Stanford 195. 1 Inſt. 8. Courtneys Caſe doth admit no Collateral diſcent could have been without the Act of Parliament, 1 Inſt. 244. 1 Inſt. 2. b. A Denizen cannot be inherited Collaterally by a Brother, Denizen, Br. 9. The Laws of other Nations guide this way: In France an Alien cannot deviſe; and ſuch as are born there, may deviſe, but cannot inherit as if they were naturalized. We are to treat Strangers as they treat us, Mag. Chart. 13. Brack. 427. Dower F. 179. Stanf. Prerog. 139. 1 Inſt. 129. in Hobbies's Caſe, there was always an apparent poſſibility for the Children to inherit their Father. If the ſecond Brother be Attainted, Stanf. 195. Dr. & St. 16. the youngeſt need not mention him in Conveyance from the eldeſt, yet is barr'd by ſuch diſability againſt Ratcliffs Caſe, 1 Inſt. 187. The Fathers Blood is Cauſa ſine qua non, but the Mothers is the inheritable Blood, and Baſtards are not of the Blood of the Mother, Dyer 374. 296. Adjornatur.

Shep-

Shepheard *againſt* Wakeman H. 13 Car. Rot. 473. Ante. 255. post 308. 1 Lev. 53.

Monday, April 28.

THe Latitat appeared to be Retoꝛned after the Cauſe of Action, which is well enough; but on Original, the Teſte muſt be beſoꝛe the Cauſe of Action: And per Curiam, the Teſte of the Latitat is not material; but the putting in Common Bail, is the beginning of the Suit. The ſecond objection was, that the Letter was not Actionable, being that ſhe was beſoꝛe God Wife to the Defendant, which was found foꝛ the Plaintiff, (but foꝛ other woꝛds foꝛ the Defendant;) yet By Jones foꝛ the Plaintiff, when there is no pꝛobable Tytle oꝛ Cauſe there to affirm he hath Tytle, the Action will lye. by Windham, this would let in great inconvenience, ſhould it not be Actionable; and moꝛe then making a Title to Land, foꝛ this is impoſing an impediment to the Marriage. Twiſden contrà; I ſée no difference betwixt this and Slander of Title, which muſt be layd pꝛeciſely, that it was ſpoken without Colour falſely, as Caves Caſe *againſt* Golding J. S. hath no Title to a Rectory, but I have more Title then he, adjudged Actionable: But yet here it is only a general claim of his own intereſt, ſo it was not ſaid in that Caſe, that there was any purchaſer. Foſter doubted, this Letter being pꝛivate: But by Windham, then the directions by the Judge at the Tryal ſhould have bèen foꝛ the Defendant; but now it ſhall be pꝛeſumed maliciouſly after Verdict, though the Name of God be uſed; but by Twiſden falſly, &c. as in Guilbert *againſt* Gerrard, ſignifies nothing, if the matter appears, as here it doth; and that the Law doth not make ſuch Conſtruction on it: Which Foſter agreed, becauſe the Letter imꝛoꝛts the contrary, and the party can never pꝛove his own pꝛivate contract. 3. It was excepted, that no place was mentioned foꝛ the Letter, but only Civitas Exon in the Margent; which, by Jones foꝛ the Plaintiff, is well enough, no other place being mentioned, and the City being a County of it ſelf.

Adjornatur.

(55) Slander. 3 Cr. 325. pl. 17. Moor 700. pl. 973. contrà. Stiles 381. pl. 828. Stiles 169. pl. 391.

The

The King *against* Trinity-House. Ante.

(56) Patents. KEeling pro Rege, that the patent is not pleaded well, being quod Queen Elizabeth Dedit Ratificavit & Confirmavit, not shewing what particular way they claim; M. 10. Car. 1. Pain *against* Pilton B. R. for he can Elect but one way, that a certain Issue may be taken. 2. The Defendant have not made Title to digg in the Kings Soil, but only as an use of such persons as had that Office, not saying as spectand. & pertinent. nor that their Office is an auncient Office, which is necessary., Dy. 70. for incidents are universally necessarily inherent, Lit. Sect. 131. and as Fealty to a Tenure, or Rent to a Reversion, 34 H. 6. 49. a Court Baron to a Mannor, Quo Warranto, Br. 4. and it may be said, Eo Warranto, without any special prescript appendant, is such as by Construction of Law follows the Grant, 4 Co. Terringhams Case, as Common or an Advowson to a Freehold, which only can be said appendant: Offices or other things are to be said appurtenant, and are supposed to begin by special Grant, 1 Inst. 121. 1 H. 7. 28. though they be claimed by Prescript; (but sometimes these words are used promiscuously;) and by considering the Nature of this Office, its apparent, that this digging cannot be incident, the principal thing necessary here is only supervising, else might any digg as well in Greenwich-Parke, as in the River, and this were to give another person interest in the Kings Soil by implication of Law: Also by grant of such Office, at this day, digging passeth not, 27 H. 8. cap. 18. being said to be a new thing, and so cannot pass as incident; and if he that hath this Office is not bound to provide Ballast, then it cannot be incident: By Lastage is only meant Lading, as Cowell Interprets, into which they Enquire, but are not thereby to provide all Lading for Ships, but only to see it be well laid on convenient Wharfs, well dryed, &c. which appears also by 27 H. 8. cap. 18. and the Patent pleaded, doth shew this, being of all Ships Veniend. Exeund. of the River Thames, and they cannot provide Ballast for Ships that come from beyond Sea; and its also with whatsoever Ballast its laded, they are to Judge of it; and 10 Car. it was certified by Noy on Petition of Trinity House, that by virtue of that Patent they could not dig Gravel; all which shew it not incident, and as appurtenant, 11 Co. 9. they have not laid good prescript, 8 Co. 122. 6 Co. 60. because their foundation is not to an ancient Office, and the Use of the Kings and Queens is but an implication, which

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is not ſufficient; and they do not anner this Priviledge to the Office as pertinent, 1 Inſt. 121. 1 H. 7. 29. 4 Co. 36. being an Intereſt in anothers Soil, P. 14 Car. 1. Lord Say *againſt* Young, Hill. 13 Car. 1. Rot. 464. That the Plaintiff had uſed to have Common for all his Tenants, which after Verdict was ruled ill, becauſe it was not ſaid for him and his Tenants, as pertinent to the Houſe whereof he and all thoſe, &c. were ſeiſed.

Newdigate for the Defendant, That this Uſage is ſufficient to ſhew it an ancient Office, 1 Cr. 555. 279. Young *againſt* Stowell, 4 Inſt. 10. and the Fees of the Judges paſs by their Patents without ſpecial words, 44 Ed. 3. 2. 10 Co. 14. and ſo an Advowſon before Prærog. Regis, 4 Inſt. 75. paſſed by Grant of a Mannor cum pertinentiis, and this being but a liberty, 9 Ed. 4. 6. 11 Co. Lyfords Caſe, need not be mentioned in the Grant, being incident to it, 12 Co. 14. Dyer 71. 1 H. 7. 8. Minſhal verbo Ballaſtage, 21 R. 2. cap. 18. Stat. Calice. Ballaſtage is the materials, Laſtage the ordering thereof, as 27 H. 8. cap. 18. This Caſe is like the Caſe of the Lead Mines in Derbyſhire, he that hath intereſt in the Peak may dig in any mans ground in the Folly. And the King may grant ſuch an Office, as a Subject cannot, Dyer 259. 30 Aſſ. 4. and that the perſons to whom ſuch Grant is made, 2 Cr. 665. debent & ſolent dig, which is a ſufficient Preſcription, Curia Claudenda, F. N. B. to ſhew that its ancient, this Quo Warranto ſuppoſeth it a liberty, and no intereſt in alieno ſolo: And therefore the Defendants are only to excuſe themſelves of a Contempt, Hub. 40. 3 Cr. 419. Yelvert. 148. Woodman *againſt* Aylin, and this only demurred on without Iſſue, and therefore all informally pleaded is well enough. The Court diſallowed the Certificate of Noy, though as it was by Twiſden, it cometh not to this Caſe, becauſe that was only that others, as well as Trinity Houſe, might by grant of the King have liberty to dig Ballaſt. Alſo Windham doubted, whether this Uſage do not make this liberty parcel of the Office. Twiſden agreed, eſpecially here by way of Excuſe; contrà if he were to claim and make a title to it: He remembred a Caſe of Watlin *againſt* King, where it was alledged that time out of mind the Sum had uſed to come in, yet becauſe the Plaintiff had not ſaid his Houſe was an ancient Houſe, they were fain to have a new Trial. Windham, If it be an Original Grant by ſeveral words, it can inure but as a Grant, but otherwiſe if it were an after Grant. Another Exception was, that the Information in the nature of a Quo Warranto, was for digging à Ponte London, and the Plea was

infra

infra Pontem Londinenſem, & altum Mare. Alſo by Windham, this being an Information, and not an Original Quo Warranto, as Bacons Caſe, is not final. Poſt. Adjornatur.

The King *againſt* Armiger.

(57) Fees. NOta, per Curiam, The Sheriff may ſuggeſt that the party will not pay his Charges of Retorn of Habeas Corpus ad faciend' & recipiend', which is at the Suit of the party; but contrà in Habeas Corpus ad faciendum & ſubjiciendum, which is at the Suit of the King, he muſt Retorn at his peril. Poſt.

Callop *againſt* Brandlin.

(58) Attorny. A Reteyner in B.R. by an Attorny of the C.B. parol, though the Attorney in C.B. as Childs Caſe, have no Warrant, is good, and the party is put to his Action upon the Caſe againſt the Attorny in C.B. but the Court will not undo the Judgment, F.N.B. Audita Quer. eſpecially being a Judgment had about five years ſince; but had there been any practice appearing in the party, the Court would have conſidered on it; but Execution being done by Cap. ad Sat. and Judgment on an Action upon Eſcape had, the Court would not examine it, but ordered the Attorny of C.B. to attend.

The King *againſt* Lawrence. Ante.

(59) Error. HE Retorned a Writ of Error, that there was no ſuch Record; which by Twiſden he cannot do, but ought to Retorn the Record, and if there be any real defect in it, it muſt here at the Retorn be ſhewed to make void the Record; which Windham denied, as this Caſe is, becauſe no ſuch Plaint as is ſpecified in the Writ is pending at the time; contrà if names in the Record be miſtaken only: But per Curiam, he muſt Retorn the Writ whether the party will pay him his Demands or not, and the Court will on the Retorn allow them. Twiſden conceived, that when a Writ of Error is brought, though the Officer will not Retorn it, yet the Court may award Reſtitution, which the Court agreed, but awarded not Reſtitution till other Writs were Retorned.

Motley

Motley *against* Slany.

HE hath forged a Bond, and that is not the first by a hundred, upon Colloquium with J. S. spake of the Plaintiff on Fitzherbert *against* Bishops Case, not saying that the Colloquium was of the Plaintiff, was moved by Baldwin, in Arrest of Judgment. But per Curiam, though to forge a Writing be not actionable, yet to forge a Deed, or any Release, &c. it is, and no Colloquium is necessary, more then is alledged. 2. It was that he spake hæc ficta falsa verba, not saying quod ficte & falso dixit, which per Curiam is well enough. Judgment for the Plaintiff. Post. (60) Slander.

ENtry of Appearance, as of the first Return, when the Term was adjourned to another, is a discontinuance, per Curiam; but doubted whether help'd by act of continuation of Judicial proceedings. Detinue Br. 19. per Hawke, 11 H. 4. 46. b. Heir may have Deceit, Fitzh. 44. (Seu 43.) Post. (61) Appearance.

Baily *against* Bertley.

BIgland moved in Arrest of Judgment, That Action for detaining Money due for a Cow sold by the Testator, to whom it was delivered to redeliver on demand, lyeth not against an Executor; to which the Court agreed, stayed Quousque, being but in nature of Trespass. Post. (62) Trover. It lyeth by Executors, 106. pl. 170. Arundel. 3 Cr. 377. pl. 28 March. 202. pl. 242. The Baylor cannot take it without leave of Baylee. Goldsb. 89. pl. 19.

Chute *against* Hall.

Tuesday, April 29.

IN Action upon the Case on a Rescous, the Visne cannot be changed on the common Affidavit, being grounded on a Process made out of this Court, though the Plaintiff have Election to lay it here, or where the Rescous was, per Curiam. (63) Visne.

Whitchurch *against* Paget. Ante.

(64) Office. MAynard moved in Arrest of Judgment, because the Plaintiff declares of two Offices by several Names, which cannot be understood but as distinct, and both being pro scriptione omnium exemplificationum, which can be incident but to one. 2. He is not an Officer sufficiently entitled to an Action, 8 Ed. 4. 5. because he is not said to be Juratus, but only admissus debito modo, which not being by Patent, is ill. 3. Its not said for what time, whether at will or for life; and cannot be understood to be for life, because he is not said seised, but possessionatus & interessatus; and if it be but at will, he may be turned out at will. 4. He sheweth no particular Fées, and so may bring a new Action for the same, or some of the same Fées. Allen for the Defendant, As to the last Exception, it's certain enough, being in toto 500 l. especially this being only an Action upon the Case for a disturbance, which is a sufficient Answer to the second and third Exceptions: And as to the first, there was several persons have power to write all, not exclusive of any other: Also by Jones for the Plaintiff, To particularize the Fées, would be infinite, therefore is the value sufficient: All which Exceptions the Court overruled. Judgment for the Plaintiff.

(65) Audit. Querela. THe Act of Oblivion coming after Verdict, and before Judgment, is good ground of Audita Querela; but will not discharge the Verdict on suggestion, because that Act having Provisoes, must be pleaded. Per Curiam.

Siderf. 82. pl. 9. Foster *against* Foster. Ante.

(66) Assurance. Moor 102. & 381. 3 Leonard 16. pl. 39. 1 Anderson 113. pl. 157. JOnes for the Defendant, To make good the first Conveyance, and that the Use thereby was changed, the words of the Indenture were, Articles of Agreement, whereby the Mother did bargain, sell, grant, demise, and set over; which was found to be as well for Natural Affection, as for 20 l. whereby he conceived that there is a sufficient Consideration to raise a Use, by way of Covenant, to stand seised, had it been expressly as well for one as the other Consideration, (as Manxells Case, and the Statute of Enrollments) it had been undoubtedly good: He agreed the Opinion in Bedells Case, though some Cases contradict it, as Dyer 146. Beaumonds Case; so Osborn *against* Church, 2 Cr. 127. And as an Averment is allowable that mony was paid where none is mentioned

Entr. Congeable, Br. 140.

tioned to be paid, ſo may Affection; but in the Caſe at Bar, there is that which doth admit of this Averment, as well as of the other of Money, being for divers other good Conſiderations, Ward *againſt* Walthew, Hill. 3 Jac. Rot. 1161. 2 Cr. 173. (on which he relied) is expreſs in this point. 2. The main Queſtion is, Whether the words and intention of this Deed will bear this Conſtruction. 1. There are ſufficient words to raiſe a Uſe at the Common Law, any words which declared the will of the Owner of the Land, Dyer 235. how he would diſpoſe the profits, were ſufficient, Dyer 96. And ſince by the Statute, 2 Cr. 400 pl. 9. though there be a greater Ceremony requiſite, yet as to the words, there is no Authority to change the Common Law. If one covenant to ſtand ſeiſed, as Bedells Caſe, and Dyer 96. for good Conſideration, though he uſe no apt words, nor although the words do properly import a Conveyance at Common Law, as Foxes Caſe, yet it may paſs by Bargain and Sale, or by way of Uſe, and betwixt the words in Foxes Caſe and this at Bar, there is no difference, though there be in the Conſideration which will not alter the Caſe, but is rather here ſtronger: Foxes Caſe might have enured otherwiſe then by way of Uſe, but here no other. 3. That the Intention of the parties was, that it ſhould thus enure is evident, in that there is nothing ſhews the intent to the contrary; for though the Articles are by way of Covenant, which refer to a future Conveyance, yet upon Conſideration of the whole Deed, it appears the Deed terminates in it ſelf, when the operative words of Demiſe and Grant are executed preſently; and it's no ways repugnant, but ſuitable to all Conveyances to reſerve a particular Eſtate, becauſe this is good in Covenants to ſtand ſeiſed, and is an Evidence of the intent to paſs it by way of Uſe: There is a Remedy for 20 l. to be paid to the Aſſignees of Margery by Action of Debt or Covenant, on the Indenture, and therefore that's no Objection. The Agreement that Margery ſhall have Matthews Barn in full of her third part, doth not appear to be part of the Conſideration of the Deed, but a Collateral Covenant; but if it were part of the Conſideration, yet this Barn paſſeth to Margery by the Deed, for ſhe was entitled to Dower, and the Defendant the eldeſt Son that was to render it, and ſo this muſt be intended an Aſſignment of it, and ſo both Eſtates mutually executed: The Authorities cited of weight, are 2 Cr. 127. in which Caſe there are words of Bargain and Sale, and the Enrollment after did declare the intent of the parties; but this Caſe went off on another point, becauſe here it might enure as a Confirmation, if it enure as a Bargain and Sale.

2 Brownl. 291. pl. 224.

Pl. Com. Manxells Caſe. Yelvert. 123. pl. 174.

March. 50. pl. 78.

2. The Case of Pitfield *against* Pierce hath been looked on as a hard Judgment, but distinguisht from our Case, because the words imported an Estate at Common Law, and no intent appeared to pass it to the contrary, though it could enure no other way. But here the Father granted to the Son after his death, and so mentioned nothing of the Freehold to be in himself, which is done in the Case at Bar, Hub. 301. In that Case there could be no proper Covenant to stand seised, being future, and never taking effect in his life, 21 H. 7. 18. which could not be good, nothing being presently executed; but Dyer 235. where there is a present Use limited to the Father, H. 20 Jac. C. B. Buckland *against* Symons, Covenant that the Son, after the death of the Father, shall have the Land, is void; contrà where the Father expressly reserveth an Estate to himself. Twisden in Wats *against* Dixies Case, the Case of Pitfield and Pierce in Special Verdict, was affirmed for good Law by all the Court. Windham, In ancient time, as in Vinians Case, there was such an Opinion as Jones conceived, but now it hath been setled, that if no intent appear but one on the Deed, it shall rather be void, then enure to any other: And the difference mentioned by Jones of the Reservation, was never mentioned; but the Point relyed on were the words Give and Grant; and it was granted, That if the Covenant had been to stand seised after his death, it had been well enough in Pitfields Case, March. 50. pl. 78. And Justice Jones conceived, That the Father intended never to make himself Tenant for life punishable of Waste by his Son, but that there were other Agreements which may be presumed in this Case; and the intent appears here by her after Feoffment to be to pass it by Bargain and Sale. Twisden, In the Case of Saunders and Saunders in C. B. the Jury found that Livery and Seisin was Indorsed on the Deed, but did not find it actually made: And therefore per Curiam, it was ruled to enure as a Covenant to stand seised, which he conceived a hard Judgment, Post.

(67) Bail.

One cannot declare by the by (to make Common or Special Bail liable) unless it be before the end of the same Term.

(68) Amerciament.

The Court doubted whether they could mitigate Fine in any Term after it is assest, yet they meet only once in two Terms to mitigate; The Clerks conceive they could not,

against

. . . . *against* Broom an Attorney of London, and of B. R.

NOta, per Curiam, a Counsellor or Clerk may by his Priviledge change Venue into Middlesex, but not elsewhere. (69) Visne.

In Default, Br. 52. Cranmer *against* Andrews. Ante.

Wednesday, April 30.

BAron in Execution on an Action brought against him and his Wife, is not bound to appear for her, unless she be Arrested; but he shall not be discharged till he put in Bail for himself and her. (70) Baron & Feme.

The King *against* Williamson. Ante.

THe Roll in Court is the Warrant for the Nisi prius, this being but a Transcript of the other; yet a Trial by Nisi prius may be had without entring the Plea Roll, but the Plea Roll cannot be altered by the Nisi prius; yet the Continuances of each Roll may be entred at any time afterwards, to avoid discontinuance, per Curiam. (71) Records.

The King *against* the Inhabitants of Yarenton.

IN Information for not repairing a way in B. from A. to D. in the Parish of C. The Defendant pleaded Quod prædict. via in the Parish of C. is in the Parish of B. and that the Inhabitants of B. ought to repair. Whereupon Sir T. F. demurred; and the Court conceived the Plea repugnant, and ordered the Inhabitants of Yarenton to repair by consent; and if the others ought to repair part, they shall refund so much as shall be after found due on the Trial; else the Court would have given Judgment. (73) Ways.

Lufton

(73) Ejectment. So where there are several of the same name, or divers goods together, the Sheriff must take notice of the light for the party, &c. March. 97. pl. 168. Pl. Com. 13. cont. Manxels c. Stiles 238. pl. 346. Godbolt. 188. pl. 135. Yelv. 228. pl.

Luston *against* Johnson.

H. in Ejectment, Count on the Moiety of two Acres of Land, which per Curiam is well enough; and trespass lyeth against the Sheriff, if he do not execute on the right places, the last Case in Yelvert. 228. pl.

Lord Buckhurst, Wentworth, and Bellasis.

If one be Killed in a Mill, and the Coroner make no Enquest, the Mill must be amerced, by Twisden; for probably, the Coroner had no notice of it; and if there were an Enquest, it must be returned by the Certiorari, per Curiam. Post. 280. pl. 81.

(74) Coven.

Lord Howard *against* Crawly.

(75) Recital.

On Duckets Case, in consideration the Plaintiff would forbear to sue the Defendant, as Executor, is ill, being only a recital: So, by Allen for the Plaintiff, to plead an entry ut Filiæ & Heredes, as the Defendant doth; which per Curiam, is well enough, as if it were a discent made to J. S. ut Filio & Heredi: But because a discent was made, without saying the auncestre died seised, Judgment for the Plaintiff Nisi, being on Demurrer on Plea.

Ante.

(76) Error. March. 46. pl. 72.

Error of a Judgment in C. B. in Ejectione firmæ assigned, on 1 Cr. 91. 594. in not certifying pledges (on Diminution alledged) in Writ of Error for that Cause; which by Powis, the Original being lost, is helpt by the Statute: But per Curiam, Omission of pledges, or of one, is Error, though after a Verdict: And the Defendant after, in nullo est erratum pleaded, may pray diminution; which, as Samsons Case, cannot be granted but on Motion, and then only to affirm the Judgment; yet when the Record is come in, it may be made use of to avoid the Judgment. Post.

Hart

Hart *againſt* Hunble.

IN Action upon the Caſe for diſturbance of Common in Weſt-fen, averring it was not within any Will or Hamlet; the Defendant demurred, and for Cauſe ſhewed, that there is no place; which, per Curiam, is well enough. And Allen cyted a Caſe affirmed on Error in the Exchequer, where ſuch an Action was laid in Church-field in Eſſex, without ſuch averment, and a Viſne de Corpore Comitatus, and ruled good: and by Windham, againſt the Lord Cravens Caſe, any place ſhall be intended a Will, unleſs the contrary appear; Judgment for the Plaintiff, Niſi. Poſt. (77) Common.

Siderf. 81. pl. 8. Arundel Executor of . . . *againſt* Trevin.

Tr. 13. Car. 2. Rot. 1442.

IN Replevin, the Defendant pleaded not Guilty of taking within the ſix years; which by Allen, is ill, and ſhould have been not Cepit, or not guilty generally, becauſe as Sir George Stroud *againſt* Bacon the Defendant, had deteyned the Cattle during that time; and the Dammages are as well for deteyning, as the taking, though the one be not a continuance of the other. But by Windham, if he that took, keeps the Beaſts in his poſſeſſion, every day is a new taking, as Treſpaſs Continuando, in which Caſe the Count is, as well on the Continuance, as on the Treſpaſs: But by Allen, the deteiner, as well as the taking, muſt be Juſtified, being diſtinct points; and this Action doth ſuppoſe the property to remain, (Co. 140. F. N. B.) but Treſpaſs alters it. Alſo if the Beaſts return to me, and after Eſtray into the Lands of J. S. who took them before, yet J. S. is chargeable with the deteyner; and this Declaration is diſtinct, being of a taking in the life of the Teſtator, and deteyning in the time of the Executors. Twiſden, a Replevin can never be Barr'd by the Statute of Limitation, if this Plea be not good. Windham, non Cepit is the proper Plea in Replevin: Yet Allen conceived this ill, becauſe if the taking were before, and deteyning within ſix years, if non Cepit be pleaded, I cannot reply that he did take, &c. But by Windham, every day is a ſeveral taking, and though the firſt were pardoned, yet the others may remain, and be made as the firſt taking, and ſo after Amends tendred on involuntary Treſpaſs, if the Cattle be deteined, Replevin lyeth, and ſhall complain of an unjuſt taking (78) Iſſue. *Non Cepit* is good Plea. 33 H. 6. 12. b. pl. 2. by *Littleton.* & 35. H. 6. 47. by *Laken.* 1 H. 6. 7. b. pl. 30. Briefe 4. H. cannot, and that the Avowant hath not Gaged deliverance or is *huc uſque* ſeiſed, becauſe no Dammages are Recoverable, for the not delivery where the taking is not *tortious* 21 Ed. 3. 20. pl. 8. Gage Del. Br. 6.

king, though that taking was good. But per Curiam, this is a strange Plea, non est Culpabilis of the taking, &c. Adjornatur.

The King *against* Armigers.

(79) Fees. UPon a Habeas Corpus to remove any person, the Sheriff must return the Writ, and the Court will allow his Charges here.

Jay *against* Ryder Siderf. 75. pl. 6.

Thursday, May 1.

(80) Proof. IN Evidence to a Jury, Challenge was made of the Bishop of Salisbury, because the Lease he was to testifie, was only by grant and demise, which implying a general Warranty, he could be no Evidence; and though there were a Special Covenant against him, and his successors, yet by Maynard for the Defendant, the Lease being Void, that is no derogation; contrà if it were but voidable: But per Curiam, this Lease is good in point of Creation, though fruitless whilst another is in being; and he was admitted. 2. The Father testified a Deed in pursuance and Affirmance of a Lease made to his Son by himself, which the Court allowed, his interest being passed away. 3. It was doubted, whither Lease by Prebend, confirmed by Dean and Chapter and Bishop, who is Patron of Lands lying in another Diocess, whereof D. is Ordinary, be good without Confirmation of D. But after ruled good. Post.

Lord Buckhurst, Wentworth, and Bellasis. Ante 278. pl. 74.

Friday, May 2.

(81) Coron. NOta, per Curiam, the Coroner is to Return his Inquisition at the next Goal Delivery, and because he did not, the Court discharged him, and set a 100 l. upon his head, they having found it Murder, and kept the Inquisition in his Pocket; whereby the Grand Jury having found it only Manslaughter, and the parties confessing it, were here Bailed. Post.

Nota

NOta, when the Cauſe is doubtful, the Court uſually in grant of Prohibitions made the firſt Rule, that parties ſhould ſhew Cauſe why a Prohibition ſhould not go: The next Rule is, that a Prohibition go, unleſs Cauſe be ſhewed; And then the Rule is made abſolute to have a Prohibition. (82) Prohibition.

THe Anſwer of a Feoffee in truſt in the Chancery was refuſed, per Curiam, to be given in Evidence, the party being living, and none of the parties to the Suit, which was betwixt the Heir and the Ceſtuy que Truſt. 2. One ſuffers a Recovery, and 4. years after maketh his Will, and therein recites that the Recovery was in truſt to perform his laſt Will, which by Twiſden, is well enough, and might have been done by parol, which makes the uſe changed ab initio. So by Wild, a Void Deed may ſerve to direct uſe of a ſubſequent Recovery. 3. Men uſually recite date of a Deed to be on, or about the true time, though they have the Indenture before them, to prevent miſtake. (83) Proof.

Robinſon *againſt* Hardy.

IN Action upon the Caſe againſt Baron, on promiſe by Indebitatus to pay debt due by Feme dum Sola on Holdage *againſt* Chaſe, Special Verdict in Action upon Account againſt Baron Sole, upon Debt ſo due, and Special Verdict, Rule that the Feme ought to be joyned in the Action; it was ſo ruled here on demurrer. Adjornatur. (84) Baron & Feme. 2 Readings 321. §. 5.

Hodges *againſt* Hodges. Error Br. 90. Ante.

POwis conceived want of Pledges Ayded by the Statute of Jeoffails, 1 Cr. 91. in C. B. where it is indorſed on the Original; but it would be otherways here in B. R. where they proceed by Bill: But becauſe Diminution was not prayed, the Court conceived it cannot be Aſſigned for Error. Poſt. (85) Error.

Reeve *against* Brown. Error Br. 13. Ante.

(86) Variance. CErtiorari to remove a Record Coram R. F. & Sociis suis, which is certified by R. F. and one other; which by Windham is well enough: Which Foster and Mallet agreed, contrà by Twisden.

Knight *against* Dancer. Ante.

Saturday, May 3.

(87) Presentation. SPecial Verdict found, That Dr. Griffith was Incumbent of the Rectory, and that the Earl of Shrewsbury was seised of the Advowson of it, and presented Mr. Griffith, Lessor of the Plaintiff, being then Recusant Convict, and that the Presentee was instituted and inducted, and was in actual Possession, and then found the Act for Ministers, 12 Car. 2. Jones for the Plaintiff that was sequestred, and another in Orders put in by Usurper, and this Action may be brought notwithstanding the Act of Ministers that Commissions several persons to determine differences, and that all Verdicts shall be conclusive, this Action being by Bill in Trinity after the Parliament began, and so not within the intent of the Act, Br. Parliament 86. being not commenced before the first day of the Parliament, to which all their Acts relate. 2. That the Presentation is void in it self, 3 Jac. cap. 5. he agreed; but yet when the Ordinary doth admit, institute, and induct thereon, it will be good to some purposes; as against all Strangers that claim not under the rightful Patron; so at Common Law, if the King present, mistaking his Title, that is void; but the Ordinary inducting thereon, its as an Original Collation, 6 Co. 29. Greens Case, Hub. 302. in Sir H. Gawdyes Case, its direct in this point, that such Person may sue for Tythes; and if the Patron will admit himself out of Possession, he must name such Clerk in the Quare Impedit, which shews that he is Incumbent. 3. The Statute shall not be taken beyond the Words, being Penal, as the Statute of Symony makes void all the Acts of Presentation, Institution, &c. this Statute, only the Presentation: And the intent of this Statute is rather to intrust the Patron with Supervisorship then Interest, and so leave it to him, whether he will turn out the Incumbent or not. 4. None is confirmed by the Act of Ministers, but such as are in such Livings as are void against all men, as well as against the Patrons. (2.) Powis

(2.) Powis for the Defendant agreed, That if the Church be not void, he is not confirmed: The words of 3 Jac. are, 3 Co. 59. b. That such Presentation is void; and the Induction thereon is also void against the true Patron, 6 Co. 50 Boswells Case, and it shall not amount to a Collation, but a meer provisional Care of the Bishop to supply the Cure, else will it be contrary to the express words used in Institution and Induction. 2. The Bishop intends not to transfer any right from himself, but is a Minister, 1 Inst. 52. a. and only an Instrument, as Cestuy in Reversion, making Livery by Letter of Attorney from Tenant for Life, which hinders not his Entry afterwards, 14 H. 8. 3. 1 Cr. 99. Stephens *against* Potter, for Institution without a Presentation is meerly void; contrà if the Bishop collate by special words, 11 H. 4. 7. Also the Act of Ministers, 5 & 9. doth take in this Case, the Lease of Ejectment being seal'd the 20 of April before the Act. Twisden, Collation within six months will never grow to a Plenarty, no more then one that enters on the King, can be a Disseisor by the Kings granting over. Also by Windham, the Opinion in Hub. 302. is against Greens Case, this being a Plenarty against no man, though the Incumbent may, during his being so, sue for Tythes. Post. Adjornatur.

Entr. Congeable, Br. 2. Granger *against* Hemborough. Ante.

(88) The Court conceived it a Departure, and gave Judgment for the Plaintiff, Nisi better Cause were shewed. Covenant.

Nevill *against* Hamerton.

(89) IN an Action of Trespass, the Defendant justified for Common: And the Plaintiff replyed, That he hath a House adjoyning to the place in which the Defendant justifies for Common, and that by West. 2. cap. 46. he took two Acres to enlarge his Curtelage, 32 Ass. 5. not saying it was an ancient House. 2. It doth appear that here is more then is necessary for enlarging of a Curtelage taken, being two of three Acres, 7 H. 4. 38. which by Jones is ill, in Trespass for breaking his Close, which Windham agreed: But this Court cannot judge that this taking two of three Acres is unreasonable, for all Circumstances considered, as the condition of the Inhabitant, &c. And by Foster and Twisden, this Plea being demurred to is frivolous, and he ought to shew that the House is ancient, though the party makes no Prescription, but only Common.

ly a Priviledge, which is given by the Statute to Houses in general. And by Allen for the Plaintiff, There needed no Averment that he left sufficient Common, which Windham a-
2 Brant. 170. b. pl. 431. greed. And Twisden conceived the Statute entended to advance Habitation, Houses being then few, and so an ancient House not requisite; contrà by Windham; for necessary supposeth it should be averred ancient, and not a necessity of his own making. Post. Adjornatur.

Hutchinson *against* Innocent.

(90) Assets. 2 Cr. 3. pl. 10. 2 Cr. 626. pl. 19. IN Action against the Executor on a Bond made by the Testator: The Defendant pleaded Judgment against her, ultra quod non habet, &c. not shewing what was the ground of the Judgment, as Bonds or single Contracts; for which Cause, as pro vero debito, the Plaintiff demurred, and Judgment per Curiam for the Plaintiff, Nisi.

Siderf. 76. pl. 8. Boulter *against* Fourd and Harris.

(91) Joynder. March. 103. pl. 176. Stiles 5. pl. 9. 2 Cr. 134. pl. 7. c. IN an Action of Covenant against two joyntly on Covenant made joyntly and severally, if the Plaintiff hath Judgment against one by default, and be barr'd against the other, as Tilly *against* Woodill on Plea pleaded, he is barr'd as to both by Allen; and so in all Actions, where of necessity they must be joyned, as in Debt or Detinue; contrà in Trespass or the like. And though the labour to build the House were several, yet the matter being contained in a Deed, is joynt; but when the Joynder is only on delictum, as two joyn in service of J. S. if one do not, the Plaintiff may recover against him alone. By Foster, as this Case is, the one Defendant having pleaded Covenants performed, and found for him, here it appears the Plaintiff hath no Cause of Action against any, which the Court agreed. Also the Defendant prayed Costs against the Plaintiff, there being here a Nil capiat per Billam awarded by the Statute, which the Court granted.
Stiles 57. pl. 124. Also in a Writ of Conspiracy against two, one confesseth, the other pleads, and its found he did not Conspire, which is found for him, both are hereby discharged, which the Court and Bar agreed, and so in this Case. Judgment for the Defendant.

Baker

Baker *againſt* Beresford. Siderf. 76. pl. 9.

IN Action by B. Adminiſtrator De bonis non of C. againſt the Adminiſtrator of the Executor de ſon tort. The Defendant pleads that the Executor de ſon tort of C. had laid out in payment of Debts to a greater value then the Perſonal Eſtate of his Teſtator the Leſſor, which per Curiam doth enable him to retain the Leaſe: And this being pleaded by Adminiſtrator of an Executor, or Executor of Adminiſtrator, that the Executor or firſt Adminiſtrator had paid, &c. he per Curiam, needed not to ſhew that the firſt Adminiſtrator paid to this purpoſe and intent; for the property is altered by operation of Law, without Election made by the party, Woodward *againſt* Darcy, Pl. Com. 185. b. And if Election were to be made, yet the Adminiſtrator of the Adminiſtrator may make it. 2. Its not ſaid, when the Adminiſtrator paid, whether before or after Adminiſtration committed; which, by Windham, is good enough, were it paid as Executor de ſon tort againſt all but Creditors: But none may be ſuppoſed for to pay contrary to his Expreſs Authority. Alſo by Foſter, this Retainer is not by payment of his own, but others Debt; and in ſuch Caſe Executor de ſon tort may retein ſo much as he payeth, eſpecially if Adminiſtration be after committed to him only, which the Court agreed; and that elſe ſuch a perſon can never plead fully Adminiſtred: Teb *againſt* Long, In Evidence to a Jury, it was held, that when once Adminiſtration is committed, he is ſo now ab initio, which is the Reaſon he may retein to himſelf: Alſo payment pleaded in vita Teſtatoris, without other particular time, is well enough, per Curiam, in Action of Covenant for Rent Arrear againſt the Teſtators under-Leſſee. Judgment for the Defendant on Demurrer to the Plea in Bar. (92)

Aſſets. Moor 2. pl. 3. 1 Brownl. 103. pl. 443.

Stiles 337. pl. 715.

5 Co. 30. cont. Coulters Caſe before 43 Eliz. cap. 8. See Hub. 49 pl. 43.

Ante.

NOta, In the Caſe of Jay and Ryder, as it was told me, Windham ſaid, that Contract by Truſtee to take a new Leaſe is preſent ſurrender of the Old Leaſe of Ceſtuy que Truſt, being by his aſſent; which Foſter and Twiſden doubted; but all agreed ſuch Contract to be good Evidence to a Jury of a Surrender, and it was ſo found by Verdict for the Plaintiff. (93)

Surrender.

Monday,

Monday, May 5.

(94) Prohibition. March. 101. pl. 174. 2 Cr. 670. pl. 9. WIld, Kings Serjeant, moved for a Prohibition to the Spiritual Court, because the Bishop would have put out a Parish Clerk, which is a Temporal Office which the Court agreed, and grant it, Nisi.

Howard *against* Golding-Prentice.

(95) Pardon. IN Evidence to a Jury, in Action upon the Case, against one Convicted of Perjury and pardoned, to recover Dammages only; the former Conviction, by Foster and Windham, may, notwithstanding the Pardon be given in Evidence, being Collateral: As in calling one Thief, after Pardon, his former ill Conversation may be given in Evidence in mitigation of Dammages, which Twisden denyed; for he may Falsifie or Travers it in this Collateral Action; but by the rest, though it be not Conclusive, yet it is good Evidence to induce belief.

The King *against* Pill, Ayres, &c.

(96) Nusance. ALlen moved to quash an Indictment of Nusance, for throwing Corrupt Water ad nocumentum inhabitantium & Legiorum transeuntium, which by him is ill; as also because no place unde ducens is layd; which being in a Highway, by Windham, is well enough, but it wanting Vi & Armis, it is ill, per Curiam, as also by Foster and Twisden. because no place is alledged from whence and whither the way leads.

Tradaham *against* .....

(97) Prohibition. AFter Nonsuit on Tryal of a Suggestion, no new Prohibition shall be granted, per Curiam, though such Nonsuit were Sworn by Default of a witness necessarily imployed.

Pateson

Pateson *against* Danges.

Lord Salisburies Case.

Wednesday, May 7.

IN Evidence to a Jury it was held, That Proclamations, whereby the Lord claimed forfeiture, ought to be proved viva voce, and not only by the Court Rolls. 2. Glyn for the Plaintiff against Maynard for the Defendant, held that forfeiture upon default at three Proclamations made to come in, is by Common Law, which the Court agreed: Though Branch *against* Lee, 10 Jac. for Forfeiture present by the Homage, the Lord may distrain or seize, but not make Proclamation; but by Twisden, he cannot distrain or seize on Forfeiture, but by Custom. 3. The Proclamation was, That J. S. come in and be admitted to the Lands discended unto him; which, by Windham, the certainty of the Lands being before declared, is sufficient, unless the Custom be contrary, and not like a demand of Rent, which being generally of so much as is arrear, is ill, which the Court agreed; the Custom of the Court being to demand it generally, and not to specifie the Lands. 4. As Havergills Case, the Court agreed, That upon Entry of Feoffor (for Rent reserved, and Entry till satisfaction) he may upon such Interest quousque maintain Ejectment, and so the Lord upon seisure of a Copyhold, till the Heir come to be admitted. 5. Allen for the Defendant conceived, That though the Lord, without Custom, might seize quousque, yet he hath no Interest to seize for a Forfeiture upon such Default on Proclamation, without Custom or personal Notice, which the Court denied: But they agreed, Cocke *against* Lees Case, That one saying he would come if the Lord had a Court, otherways not, which is no Forfeiture; but contrary, the Lord on such Refusal might seize quousque: And by Windham, its not like the demand of a Fine which groweth due by Refusal and Contempt, not by Default, as here.

(98) Copyhold.

2 Cr. 511. pl. 22.

Sir

Siderf. 77. pl. 1. Sir John Cotton *against* Wiseman.

(99) Partition. In Custom, Br. 44.

ON Evidence at Bar in Ejectment of certain Lands in Gavelkind, doubted if only by custom devisable, and may be so disposed by parol, or that they cannot be devisable otherways then as Gavelkind, because the custom to devise is not through all Kent, as Capite Land is not devisable, by Allen for the Plaintiff: But by Wild for the Defendant, The very Issue must admit that the Lands are Gavelkind; yet Brooke *gainst* Lander, 15 Car. 1. B.R. agreed, 1 Cr. 561. that to be devisable is Collateral to the Gavelkind, and some Gavelkind is not devisable; therefore special Prescription & Proof must be made thereof, but that it's partible, it is incident to the nature of Gavelkind; but that Father to the Bough, &c. or that the Wife should have a moiety, these are Collateral, and must be pleaded specially. But by Twisden, this custom to devise is incident to Gavelkind; and by the Attainder of such Tenant, or by any Act of Parliament, as 2 & 3 Ed. 6. that Disgavels it, this power to devise is taken away, which was direct to be found, especially admitting all Lands Gavelkind is devisable, whether by 2 & 3 Ed. 6. which disgavels these Lands, as to the partibility, making them discendible, as at Common Law, this incidenc to devise be destroyed. Post.

Goldsb. 115. pl. 10.

Siderf. 77. pl. 12. Sir Henry Herbert *against* Paget.

(100) Action upon the Case.

IN Action upon the Case for negligent keeping Records, whereby Judgment against the Plaintiff at the Suit (begun 1656.) of Walker in Action for Slander, being in the Exchequer, 1659. like to be reversed, a Capiatur being entred for a Misericordia, and afterward was in the Defendants Office, being Keeper of the Records, Razed, and made in Misericordia, for which per Curiam, an Officer, de facto, only is responsible for, as well as de Jure, being a Misdemeanor: But the Clerk of the Errors, the Philizers, and Clerk of the Nisi prius, and the Prothonotaries, and their Clerks, have uncontroulable privilege to go into the Treasury, and have free sight of any Record within six Terms, but after pay 6 d. for it. 2. An Officer without special negligence shewed, is not responsible (as the Keeper of the Goal) at his Peril, especially the Attornies having power to alter and mend their own Rolls without Controll.

Dr. & St. 135. in Baily Br. 42.

Van-

Vandevalde *against* Lluellin.

Friday, May 9.

(101) Assumpsit.

IN Action upon the Case on Assumpsit to pay the value of such Goods as were of J. S. and his partners, the Defendant pleaded that the Goods were not J. S. and his partners, and Issue thereon, the Verdict found the Value for the Plaintiff. Finch for the Defendant, moved for a Repleder, which by Twisden cannot well be, but rather a Venire Facias de novo. Adjornatur. 291. pl. 108.

The King *against* Dawson.

(102) Perjury.

IN Evidence upon Information of Perjury, it was observed; That one Indicted of Perjury, may be a witness in the same point, upon Tryal betwixt others, till Conviction, as Sir Ed. Powels Case. Post.

Dr. Patricke.

(103) Mandamus. It is visitable by the Kings Commissioners, 25 H. 8. c. 21. Poult. 556. Where the King is Founder he shall Visit, and not the Ordinary. Lit. C. 96.

KEeling moved for Mandamus to admit him, being by a Majority of the Fellows, chosen Master of Queens College; which the Court denyed, though the Statutes of the House appoint no particular Visitor, to whom Appeal might be made. Windham conceived it a mixt Corporation both Lay and Ecclesiastick, and so to appertain to the Jurisdiction of the Ordinary of Common Right: But by Twisden, This is a meer Lay Corporation: And per Curiam, the Writ for Dr. Willington was granted, only because it had been so once done before, but ought not to have been, had it appeared (as now) to be upon differences in Colledges. Twisden cited the Case of Lewis and Day. Post 294. pl. 220.

The King *againſt* Douglas, &c.

(104) Peace. SPilman moved for a Supplicavit, as the beſt way to quiet poſſeſſion, upon Articles exhibited; wherein it appeared that ſeveral perſons had made a diſturbance in the Church, and pull'd the Miniſter, reading the Divine Service, (viz. the Common Prayer) in the Church, and carrying him to the Compter; which the Court granted; and further adviſed to inform againſt them for a Riot; This, by Windham, being little better then the beginning of a new Rebellion.

Sir Chriſtopher Guiſe *againſt* Adams, Fenne, &c. Tenants of Pureſoy.

Saturday, May 10.

(105) Fiſh. The Viſne is of both Countries Dyer 267.b.pl. 14. Raſt. Entr. 665. b. 5. 1. 2 Rolls abr. 258. Tit. Piſcary. Entre F. 2. 1 Cr. 492. pl. 571. 46 Ed. 3. 28. b. pl. 21. Da. 57. b. contrà. IN Evidence to a Jury at Bar, in Treſpaſs for a ſeveral fiſhing: Upon Not-guilty pleaded, if the Plaintiff derive a Title as high as the Abbies, he need not ſhew any Patent, or derivation from the Crown, but the conſtant enjoyment is ſufficient, unleſs one be ſued by the Crown; which, Twiſden ſaid, he knew to have been ruled in a former Caſe wherein he was Counſel. 2. A ſeveral Piſcary uſque ad filum aquæ cannot be counted on. But, by Windham, ſuch Evidence might be given of ſuch a Piſcary by Meets and Bounds, Kell. 53. b. pl. 11. Treſpaſs Br. 426.

Eyre *againſt* Eyre. Ante.

Tr. 1658. Rot. 2498. Ex. 2418.

(106) Variance. A Writ of Error direct to Sir Orlando Bridgman & Socijs, of a Record, quod coram vobis quia in Recordo & Proceſſu Ac. etiam in redditione Judicij quod coram vobis; whereas all the proceſs, till the Judgment, was Coram Olivero Saint-John, but the Judgment before Sir Orlando; and, by Keeling, it was moved to quaſh the Writ of Error, becauſe it ought to have been eſpecially of the Record and Proceſs before one, and of Judgment before another: But, by Stroud for the Plaintiff, a Record in Curia Domini Regis, which was in the time of the Keepers, was ruled here good, which the Court, Foſter abſente, agreed, yet doubted here. Adjornatur. 294. pl. 291.

The

The King *againſt* Mucklow, &c.

NEwdigate moved to quaſh an Indictment of Forcible Entry; 1. Becauſe its ſaid at the Seſſions of the Peace at Leiceſter, in the Feaſt week of St. Michael, which began on Sunday, and they have no power by 2 H. 5. cap. 4. to hold Seſſions till after that week. But by Windham, its ill, becauſe the Feaſt continueth eight days from the Utas, and the Seſſions cannot be held till after the eight days. 2. Its ſaid Juratores ſworn to Enquire for the King, and for the Body of the County, which per Curiam is ill. 3. Its ſaid that they Entred not, ſhewing that quilibet eorum Entred, which by Twiſden is an old Exception, and fatal: But theſe being taken the laſt day but one of the Term, the Court would not grant Reſtitution; but Adjornatur. Poſt 293. pl. 118. (107) Force.

Lluellin *againſt* Vandevalde. Ante 289. pl. 101.

THe Jury found the Iſſue & ulterius an impertinent thing, which, by Twiſden, is well enough; and therefore the Court would make no Rule for any Repleader. (108) Verdict.

Price *againſt* Gibbons.

CArpenter prayed a Prohibition upon Suggeſtion of a Suit in the Prerogative Court, of an Adminiſtrator of an Executor, for Legacy left by the firſt Teſtator, which the Court denied; becauſe if they give Judgment againſt the Adminiſtrator, an Appeal lyeth. (109) Legacy.

INdictment for Nuſance in alta antiqua via vehicularum in Cretingham, leading from A. to C. not ſaying Regia; yet the Court would not quaſh till a Certificate that it be removed. Stiles 108. pl. 226. (110) Nuſance.

Read *againſt* Dawſon. Ante.

Monday, May 12.

THe Court ſtayed Execution upon Verdict had againſt R. upon Conviction of Perjury, on Affidavit by ſeveral credible perſons, that the Plaintiff had ſworn Truth, until Trial had againſt D. who was after convicted upon that point of convicting R. Poſt. (111) Perjury.

The King *against* Roberts.

(112) Poor. ONe was Indicted for not performing an Order of Sessions, which licenced J. S. to build a Cottage, which being removed out of Dorcetshire hither by Certiorari, was quasht per Curiam, no time being when the Tenant refused to perform it, nor before what Justices.

Error, Br. 90. Hodges *against* Hodges. Ante.

(113) Bail. Hub. 264. pl. 341. 342. 1 Cr. 594. WAnt of Pledges in C. B. by Windham, as this Case is, cannot be assigned for Error, because upon diminution alledged, the Prothonotaries certified that there was no Original; and also by him Pledges might be put in Chancery in Writs Si fecerit te securum, and they are to be indorsed, and so cannot appear to the Court without the Original certified; and by the Statute, want of Original being helpt, want of Pledges is so. Twisden, Hussey *against* Moore, 2 Cr. 413. is contrary; and so he held 18 Ed. 4. 9. 4 Inst. cap. Justices of Peace, Pledges may be found any time, in the Court out of which the Writ issueth, 1 Ed. 3. 5. b. pl. 23. hanging the Writ: And so the Plaintiff must take Order, that though there be no Original, yet they must be filed. Post.

Adjornatur.

The King *against* Finch.

(114) Poor. PRocedendo awarded upon Indictment, removed hither by Certiorari, and no Prosecution made; the Indictment being for not executing the Office of Overseer of the Poor.

The King *against* Grove.

(115) Trades. PRocter moved to quash an Indictment for using the Trade of a Mercer, against the Statute of 5 Eliz. being an Art used at that time without express Averment, which, per Curiam, is ill; so of a Draper and Haberdasher, not saying contrà Pacem; therefore both quasht, and the Clerk of the Peace fined.

The King *againſt* Armiger. Ante.

A Declaration cannot be entred againſt one brought in by Habeas Corpus, till he be in Cuſtodia, or unleſs a Latitat delivered into Court at the time of the Return. (124) Impriſonment.

The King *againſt* Peachie.

HE was Indicted for not uſing the Book of Common Prayer, which the Court would not quaſh, till the parties pleaded to it; though it did not appear in the Indictment, that he was ſuch a perſon as ought to read it. (125) Religion.

Powers *againſt* Powers. In Error, Br. 55.

ERror of Action upon Treſpaſs of Aſſault without Bail, it was mov'd to be good, & not to be within the Stat. 13 Car. 2. c. 2. that orders Bail in Treſpaſs: But, per Curiam, this is a Treſpaſs, and therefore within the Act, 21 Jac. doth name Treſpaſs generally, but Ejectment is not within the Act. (126) Bayl.

Weſton *againſt* Hort. Ante.

IN Action upon the Caſe for not repairing a Weere, after Verdict, it was moved, that preſcription that the Occupiers of Black Acre ought to repair, is ill. Poſt. Adjornatur. (127) Sewers. Owen 114.

The King *againſt* Cole.

INdictment for Riot and Aſſault, laid in Eccleſia parochialis de H. which is ſufficient place of Venue, prædict. being added. 2. It was not ſaid, that they Ritouſly aſſembled, but only, quod Vi & Armis, did commit a Riot; which, per Curiam, is good enough. (128) Peace. Hitch. 161. b. pl. 447.

UPon a Scire Facias on Error brought, the Defendant ought to Non pros. the Plaintiff, and not to bring a Scire Facias Quare Executionem non, which is in effect only to cauſe the Errors to be aſſigned. Adjornatur. (129) Error. Error Br. 6.

Norpil

Norpil *against* May.

(130) Days. IN Action upon the Case for disturbing one in the Office of Water-Baily, the Court refuse to hear motion in Arrest of Judgment; Or for setting aside Judgment; Or to grant Prohibitions; Or to make Reports; Or any difficult Matters of Law on the last day of the Term.

(131) Bail. NOta, By the course of the Court, when the Bail is to be changed, the Principal must be committed, (whereby the first Bail is discharged,) and then a new Bail may be filed; but by consent the Bail, may be sworn as a witness in the same Cause.

(132) Variance. SCire Facias Teste 23 Jan. Hill. 13. Car. 2. The second is Teste 31 Jan. 13. Car. 2. which, the King changing his Reign in Hillary Term, is ill, by Allen, who, for that cause, prayed Judgment might be staid. But this being moved after Nul tiel Record pleaded, by Windham, is well enough; which the Court agreed. 2. Upon bringing in the Record, upon notice of it, Judgment must be entred; but notice is not absolutely necessary.

(133) Bail. It is said against Law in Ecclesiastical Court to tyth H. *pro salute Animæ* generally without shewing the Cause. Fulb. parratit. 15. NOta, The Attornies do usually avoid the late Act made against General Writs of Trespass taken out of B. R. and not shewing Special Causes of Action, whereby they ought not to have Special Bail, unless for above 40 l. but by feigning on the Latitat, that the Bail answer to the Trespass counted on; and also to a Bill of 100 l. (Feigned) that shall be brought against them, by color whereof they take what Bail they will:

DE

DE TERMINO Trinitatis,

14 *Car.* II. *B. R.* Die Saturnij, 30 Maij, Anno 1662.

Foster *Chief Justice.*
Mallet,
Twisden,
Windham.

The King *against* Dawson. Ante.

THe Kings Attorney moved to restore one Read, formerly convicted at the Suit of Dawson, by reason that Conviction was disproved in a Trial against Dawson, which Foster agréed. But by Twisden, the Conviction remains, and till Pardon, the Court cannot restore him to his Practice, as Attorney in the Court, though this be but a Grace of the Court, and not taken away by the Conviction, but is a Consequent of it. But per Curiam, till Pardon, he cannot be admitted as a Witness. Windham agréed with Twisden. Advisatur that Read procure pardon. (1) Pardon.

Dr. Patricke. Ante.

(2) Mandamus. KEeling moved for an aliàs Mandamus to restore; but the Writ being returnable but this day, the Court refused it till default made.

Windibank *against* Bear. Ante.

(3) Assize. THe Tenant excepted to the Writ, because it was Octabas for Octavas &, and wanting & only. And also it was returnable at Westm. coram Rege, which ought to be ubicunque, &c. And this after a Special Imparlance, the first Exception was waived; but Twisden held the last invalid, according as Stiles But all the Presidents are contrary ubicunque, and this is an Assize which will not lye out of the County. Windham doubted whether now the Court shall not intend it well enough, being it sits at Westminster. Post. 303. pl. 13. Adjornatur.

Lord Dunbarre *against* the Commissioners of Sewers.

Siderf. 78. pl. 2.

(4) Sewers. WItherington excepted to a Return by Commissioners of Sewers; 1. The Jury presented, That there is a Gettée repairable by the King or the Lord of the Manor of Preston, distinct from that which the Plaintiff ought to repair at the lower end of the Pasture, not saying where this is, or of what quantity it is; all this is in English, which, per Curiam, is all well enough, a Gettee being certain, and the form usual. 2. The Presentors are impannel'd to see and present only intrà medium Ballivæ de H. and it doth not appear that this place is within the Bailywick; but the Court would not willingly quash this till the place be repaired, especially here the Commissioners being bound to no legal Forms in strictness; but something must appear whereby they have no Jurisdiction which is issuable. Ante. Adjornatur.

Hodges

In Error, Br. 90. Hodges *against* Hodges. Ante.

After Verdict in Ejectione firmæ, and Judgment given, (5)
Powis moved that where there is Original, and no Pledges, it's Error, 2 Cr. 414. but where there is no Original, M. 16 Car. 1 Cr. 594. Tregose *against*..... and so it cannot appear whether there are any Pledges or not, it is none, but aided by the Statute. Twisden denied the Ground, because Pledges may be return'd in Chancery, or without the Original. But by Powis for the Defendant, in C. B. the Pledges must be indorsed on the Original, though they may be filed any time after the Return thereof, which Windham agreed; and that this is aided by the Stat. lest all the Judgments in C. B. be overthrown. And whether Pledges be found in Chancery, or before the Sheriff in the County, it must appear by the Original Error, Young *against* Young, 4 Car. because an Infant found no Pledges, coming of Age before the Trial; and this Judgment was affirmed, because the Plaintiff in the Writ of Error had not removed the Original, whereby it might appear that there were Pledges. Twisden, This is expresly against Moore and Hussyes Case, 2 Cr. 414. And the Writ Summoneas si A. fecerit, &c. warrants not this Indorsment; and though the Statute aids want of Original, yet not this benefit and security of the Kings Amerciaments, being Collateral to the Writ it self. But by Twisden in 2 Cr. 414. the Original was certified, and the Plaintiff not having alledged Diminution in the Case of Young, whereby the Original might be certified, Judgment was against him. Foster remembred well the Case of Moore and Hussey, and this is far different from it, and will be of greater inconvenience. But by the Clerks, no Diminution is here prayed by the Plaintiff in the Writ of Error, and so this regularly cannot be assigned: But the Defendants having prayed it, the Court conceived it well enough by whatever means the Record cometh in; but here Diminution is only alledged in the Venire Facias and Habeas Corpus, and so the Original is not certified: wherefore, per Curiam, Judgment affirmed, Nisi. Post. Bail.

2 Cr. 413 pl. 2.

The King *against* Pope.

Saturday, May 31.

(6) Peace. HOskins moved to quash an Indictment for not obeying an Order of Sessions in Dorset; 1. Because it doth not appear that he doth inhabit in the County. 2. The Defendant was bound to two Overseers, and one dying, and the other becoming indigent, the Parish warned him not to pay it to the other, and yet he did it, being bound; and the Justices have no power to call Pope, but only the Overseers, to accompt. 3. They ordered that another Bond should be assigned to Pope in lieu of his own made to the Overseers; but it doth appear that the payment was by Collusion, and that the Money is yet in the hands of Pope, and therefore the Indictment was to stand, unless the Defendant consent to stand to the Award of the Judges of Assize.

Hunt *against* Locke.

(7) Verdict. TO set aside a Verdict given for the Plaintiff, It was sworn that the Defendants Servant had talked with a Juror, and that before that, that the Jurors were most of Opinion for the Plaintiff: And, by Twisden, this is sufficient to set aside the Verdict: But if the Verdict had been for the Plaintiff, such Offence had been only fineable, which the Court agreed. Adjornatur.

The King *against* Trinity-House. Ante.

(8) Franchise. HOwel pro Rege, Exception 1. That it is said that they do fodere, extrahere, &c. taking and carrying away, and the Plea is only to the digging and taking away; and saith nothing of the Application thereof, which cannot be but by Asportation and Extraction, and hereby that is disclaimed. 2. It is said, as to the taking infrà Pontem Lond. and the High-Sea, he Justifies, which is impossible; but ought to be, as afterwards is said, quod inter Pontem L. and the High-Sea; and here he hath applyed the taking to infrà, whereas the charge is for taking it à Ponte ad Mare. But, by Windham, inter & infrà are all one: But, by Howell, infrà must be either of one side or other of the Sea, and so must exclude the contrary side of the Bridge. 3. Its said, Eo Warranto, without applying it to any place certain; so that the taking is every

Godbolt. 67. pl. 8.

every where betwixt the Bridge and the Sea. 4. Its not said, That the Master, Wardens, and Assistants were Denizens according to their Incorporation, Aliens being Excluded: As to the Matter in Law, whether this be an Office, or a Liberty only, as an Office, its not sufficiently pleaded, 2 Cr. 615. That the Kings and Quéens have used to grant it, unless the thing it self be said auncient, or created by certain words; contrà of a Messuage or Mill. 2. Its not said, That this taking of Ballast is parcel of the Office, but only that such as had the Office have used to take, &c. Whereby being in aliquo convenienti loco, the King may be excluded out of his own Inheritance, they being Judges of the conveniency, Dy. 326. Lands gained out of the Sea, or Navigable Rivers, is the Kings as auncient as his Crown, Dy. 11. 7. which is the Reason that Royal Fish belong to him; and no Custom can fetch Lands farther then the Low-Water Mark, being against Reason. And granting power to dig in my own Land, cannot exclude my self, Stanf. Prerog. cap. 15. Bract. L. 1. cap. quæ res Dari possunt, this being auncient Inheritance, nullum tempus occurit Regi: But its otherways in new purchased Lands, L. 50. Ed. 4. 121. the King shall not be bound by any Custom, that goeth to the Person, or the Goods, 35 H. 6. 25. as of London, that pawned Goods may be deteined against any Owner, 8 Ed. 4. 18. Allen for the Defendant, As to the first, the digging and Ballasting is all the Defendant claims, for he hath no power to take it, and carry it whither he will, but must use it for Ballast. 2. Infra Pontem must be intended betwixt, and not below the Sea; and that H. is Infrà quatuor maria. 3. That the Corporation is made capable of purchasing, by being enabled to sue, Hub. 211. Grants F. 30. 4. There is a place of the Grant of the Letters Patents, but the want of place in the Plea is not so fatal, as the want of it in the Information, which layeth no part of the Usurpation to be in London, where the Action is brought, and Juxta Lond. is not sufficient; and the Plea answers to the Usurpation fully. 5. The Quo Warranto it self doth suppose, the Master, Wardens, and Assistants were Subjects, especially no question being here upon the Charter. 6. The Charter is pleaded as Grant and Confirmation; which being Hic in Curia prolate is well enough, and needed not plead it only one way, especially where the Conveyance cannot operate several ways, as by Feoffment or Bargain and Sale. As to the Matter in Law, he agréed, That in prescription for House to an Office, he must say ad officium præd. spectand. but where a thing is claimed, that is of the Essence of the thing granted,

its

its needless, as in Quo Warranto for the Office of Cole-meeter, its sufficient to lay the Kings Grantée have used to meet Coles, &c. So of Gaugeor or Garbler, which are but Imployments, and all alike in the Conusance of the Court. That the Office is thus to dig Ballast, and order it, is evident, in that no such Office was ever in being, as to see that Ships were well Ballasted; and the Statute, 27. H. 8. 8. cyted to the contrary, doth take notice that such Officer hath this Liberty. But admitting it an Office of Survey, yet the Plea is good; for the digging is not claimed as parcel of the Office, but by the Grant of Lastage and Ballastage, which is the very thing proper to Ballast Ships, which as Spilman, Glos. verbo Lastage, who cites 22 R. 2. 8. the Statute of Calice, the Grant is by whatsoever name or kinds the Lastage was then used, known, reputed, or exercised; and the usage is declaratory, that such as had Grant used to dig, and so is not in nature of incident to Office, or grounded on any Prescription. Twisden was not satisfied with the Exception of pleading it with several words: But Windham was satisfied with Allens difference: So Foster; This cannot enure any other way then as a Grant, there being no precedent Grant made. Twisden, To plead a former Patent, and after say Dedit & Confirmavit, it can enure but as a Confirmation; and yet it is naught, being against the King. 2. The Visne ought to be alledged in the Plea, to Entitle the Defendant against the King, who else shall have Judgment, whither he hath Title or no: And by Foster; Ballastage is not so properly the Gravel, because it may be of other Materials, as Cole-Ships are often Ballasted with Coles; and this is not well pleaded as incident or appurtenant, 4 H. 6. 13. because neither are relied on. Adjornatur.

Orton *against* Fuller. Ante.

(9) Slander.

H. Said I was Perjured, but he is Perjured as well as I. This is Actionable by Barwell, without any Averment that I was Perjured, which the Court agréed. Judgment for the Plaintiff. Nisi.

The

The King *against* Billing.

BEcause he had forged an Attachment of Priviledge as an Attorny (and was none) against 100. persons, and had Arrested one or two of them, and made them compound: The Court committed him to the Marshal, and ordered an Indictment of Barretry, and another of Forgery, to be exhibited against him. (10) Forgery.

Baker *against* Thrower.

Monday, June 2.

IN Action upon the Case for words, after Imparlance, the Defendant pleaded Priviledge; which, per Curiam, Priviledge of an Attorney in B. R. is not pleadable after Imparlance on Demurrer made on such Plea. (11) Priviledge.

The King *against* Bowdwich.

STroud pro Rege, moved to quash an Indictment of Perjury, because the Recital of the Interrogatories was in a Commission to examine Bond betwixt J. S. and A. the Sum, and the figure of 9 mistaken for 7 in the Date, and the Bond was entred into by the Father, as was set forth in Chancery. But by Allen, the Bill being only for discovery prefer'd against the Son, whether it were made by him, or by whom, and so the Interrogatories differing from the Charge, makes no fault in the Indictment, especially after the Defendant is found Not guilty. Adjornatur. (12) Perjury. Yervert. 22. pl. 34.

Windebank *against* Bear, Ante, 298. pl. 3.

JOnes for the Plaintiff, as to the Return coram Rege apud Westm. the Assize being in the same County, is according to the Register; and where any Writ is returnable at a day certain, and not on the common Return, it is returnable always at a place certain; and it had been a good Exception had it been otherways, which Twisden agreed: And 2 Octabas or Octavas is alike, and all the Records are Octabas; the Court conceived both well enough; and Audit. for ad audiend. is well enough, per Curiam, some Writs being ad audiend. F. N. B. 178. b. some Adituri only, Respond. ouster Awarded per Curiam. And Twisden cited a Case brought here by Error in Venire (13) Assize. Ravishment of Ward Returned *Coram Justic. Nostris*, without saying where, is good, 3 Ed. 3. 2. b. pl. 4. 2 Brant. 23. b. pl. 24.

Venire Facias, per quos rei veritas melius scire potest, which was ruled Error; Sciri being by custom made allowable, though no Latin word, and notwithstanding Calvins Case, or that this lay in Middlesex, which Glyn urged fortiter to be different from all other places, because the Courts are constantly there, and the C. B. also; but when the Kings Bench is removed it may be otherways. And by Windham, this Action is not brought before us as Justices in B. R. but as having the Power of Justices in Eyre, F. N. B 71. 72. Coram nobis in the Register intends only Justices in Eyre, and only ubicunque distinguisheth this Court from it: But Presidents being doubted, Adjornatur. Fairfax *against* Fairfax was Returned Coram nobis in superiori Banco apud Westm.

The King *against* Sir Henry Vane and Lambert.

(14) Treason. Siderf. 84. pl. 13.

VAne was Indicted, That intending to bring the King to death, he had compassed the same by endeavouring to change the Government; and to fulfil such intent, 11 Car. 2. had assembled (30 May, 1659.) with others to consult of, and had usurped the Government; as also by regulating the Forces of the Nation then raised against the King; and that (20 Dec. An. prædict.) had been in the Head of 1000 persons armed. The Prisoner desired to hear the Indictment read in Latin, which the Court refused, 36 Ed. 3. being that the Records must be entred in Latin, but discussed in English; and the Indictment was read twice in English, which was conceived more then usual. 2. He excepted, That the Indictment doth not pursue 25 Ed. 3. 2. no particular Acts of levying War having been charged certainly, by reason it wants place, which was mistaken. Post.

2. Lambert was Indicted for levying War at the same time; he pleaded, that the Commons had excepted him only as to pain, not extending to Life, which the Lords refused, and for expedient, the Proclamation was made for persons to come in, which the Lords now have comprised him in, which was a full consent of the two Houses to save his Life: And pursuant to this, the Letter by the King to the Commons, to whom he left it to make Provision; and thus the consent of the three Estates concurred in his Pardon, nothing that is essential to a Law, but is in this particular. Sir Jeffery Palmer, Kings Attorny, conceived this is a Petition of the two Houses to the King, and his Grant of their desires: But this being not under Seal, cannot be pleaded, but is an Inducement to the Kings Pardon; which the Court agreed. Post.

Such a Plea held good, 29 Ed. 3. 48. b. in counterpleading of Receit, pl. 18 per Willbye.

The

The King *against* Zachary Crofton. Siderf. 78. pl. 1.

HE was committed for matters of High Treason, 23 March 1660. which being long, though the Kings Counsel had no notice till the delivery of the Habeas Corpus, the Court conceived it ought to be filed, though delivered but one Court day before; though they conceived the three days by 17 Car. 1. to be exclusive of the day of delivery of it, and ordered the Return to be filed to morrow, and he bailed, unless cause be shewed to the contrary. Post 305. pl. 17. (15) Habeas Corpus.

Devoe *against* Dr. Coridon. In Detinue, Br. 2.

Tuesday, June 3.

IN Trover for Jewels, it was said by Twisden, there is no Plea in Trover, but a Release or Not guilty, every special Plea in Justification being but tantamount: But the Defendant being in the Kings Service Command, after the Declaration delivered, the Court gave an Imparlance Nisi, but upon motion the next day of the Kings Solicitor, ordered the Trial. (16) Trover.

The King *against* Crofton. Ante 305. pl. 15.

SIr Jeoffry Palmer conceived him not bailable, but (by the Solicitor) only at discretion of the Court, not Ex debito Justiciæ, and so the filing of the Writ would be to no purpose: And by Wild, the Kings Serjeant, the particular Treason is not necessary to be specified. And by Keeling, the Kings Serjeant, the whole House of Commons, 3 Car. conceived this general Return good, and the King needed not discover the Particulars, which may be inconvenient, and he offered to Indict him this Term. Newdigate for the Prisoner, conceived the Court not possest of the Cause till filed, and both are the Kings Prisons, and no inconvenience in either; and the Court cannot debate the Cause till filed; Windham agreed with Newdigate, That whatever the Return be, if it appear to the Court that there is a default of Prosecution, there is no cause but the Return ought to be filed, else the party may lye for ever in Prison, and this delay was the reason of the Habeas Corpus. The Attorney cited Russels Case, where three Months was conceived a very reasonable time, and in dangerous times, as now, Imprisonment may be for punishment (17) Bail. 1 Cr. 219. pl. 10. 1 Leonard 70. pl. 94.

for prevention as well as for Custody. Twisden agreed with Windham, That this Court cannot remand him till after the Writ filed, after the Committitur is entred the Remittitur, or else that Traditur in Ballium: and by Windham, had the Return been, That he had endeavoured to Kill the King, the foulest Treason, yet that is no Argument against the filing it: and by Twisden, this Court cannot take notice of the Cause till it be filed; Foster ad idem: and being filed, it was read again, and Newdigate prayed, in respect of the delay, that he may be bailed, which the Court refused, the Kings Counsel assenting, that they would Indict him this Term; though Cornwallis Case was only by length of time, that he was Bail'd, and by consent of the Kings Counsel, entred a Rule quod Remittitur, and brought hither the last day of the Term, and if no Indictment be then found, to be Baild, and so he was.

Windebank *against* Bear. Ante.

(18) Assize. 1 Brown. 151. pl. 517.

AGainst 19 Jac. Min *against* Maidwell, an Assize returned coram nobis ubicunque; on the contrary was cited the pleading of it in Rast. Entr. 60. is an Assize Returned coram nobis apud Westm. And by Allen, the ubicunque relates only to the Return, and not to the Stile of the Court. Stroud for the Defendant, cited also Yelvert. 60. Brigs *against* Thomson and had not the C. B. been sitting at the same time, here a Return apud. Westm. had been good enough. Windham, upon perusal of all the Presidents of Eyre, Never read of any Return coram Rege in Itin. but before the Justices in Eyre by particular Name, 4. Inst. And the Register denyeth not, but an Assize may be here, but not when the C. B is in the same County: But F. N. B. is contrary, and so is the constant practice. And this is beyond the Authority of Calvins Case, which was but an amicable suit, Artic. super Chart. proves that Assizes were aunciently tryable here. 2. Octabas he conceived by Corruption from Octavæ, the eight days after the Utas, being the Feast; but by Custom and usage its well enough either way, Stat. de die in Banco: 3. Audit is better Latin, and more frequent: Twisden, ad idem in omnibus, the distinguishing Caracter of the Court is Coram nobis only, Brief. F. 105. Pl. Com. 73. Audituri is the properest word; Mallet ad idem; So Foster Respond. ouster: Whereupon he pleaded Nul tort, and Issue joyned. Adjornatur.

The

The King *against* Lord Buckhurſt, &c. Ante.

THey now pleaded the Kings Pardon, having before confeſſed the Indictment of Manſlaughter which the Court allowed; but the Coroners Enqueſt being returned Murder, they pleaded by direction of the Court, Auterfoits Convict. (19) Pardon.

Hart *againſt* Humble. Ante.

IN Action upon the Caſe for diſturbing of Common in Weſt. Fem. averring it to be lieu conus out of hamlet or Pariſh; on demurrer to the Count, for uncertainty of place, the Court conceive it well enough. Judgment for the Plaintiff, Niſi. (20) Common.

Bill *againſt* Neal. Ante.

LIndly moved for Judgment, the words being affirmative of the Plaintiff, as proximum antecedens; and eſpecially, becauſe its thereby inſinuated, that the Plaintiff was unfit for a Juſtice, which is an Office of Truſt, Credit, and Profit; 1 Cr. 270. Cawdry *againſt* Higley: The Court conceived (the Opinion of the Court to be againſt the Book) 17 Car. 1. Sanderſon *againſt* Rud, That A. was an ignorant man, and not fit for the place, (viz. Steward of Court;) had theſe words been ſpoken of a Lawyer, or Phyſitian, they had been Actionable, per Curiam, but not ſo here, H. 22. Car. Rot. 725. Hammon *againſt* Kingsby, He was a Debauch't man, and not fit to be a Juſtice of Peace; which had been Actionable, had the words been in the Preſent Tenſe; but the Court, by Twiſden, delivered no Opinion as to that; and though the Statute requireth diſcretion, yet to call one indiſcreet Juſtice, is not Actionable. Allen for the Defendant, here is no crime charged or applied to the Condition of the perſon, 2 Cr. 90. As the words relate to the Plaintiff, the Court were of Opinion with him; but not ſo now, upon conſideration of the words themſelves, the Caſe of Holly and Briſtow is ſtronger then this, That he was a Raſcally Villain, &c. and though Juſtices have wages, its no profitable Office to him; and this is no Crime in him, but he is ſuch as God hath made him. Twiſden ad Idem: Mallet contrà; Foſter conceived the words not Actionable, but would have the Defendant bound to good behaviour, which the Court agreed, and ordered it accordingly. (21) Judgment.

Judgment for the Defendant.

In Error Br. 55. Lufton *against* Johnſon.

Wedneſday, June 4.

(22) Error. 13 Car. 2. c. 2. 16 & 17. Car. 2 cap. 8.

ERror without Bail is a Superſedeas in Ejectment, as hath been ruled in C. B. notwithſtanding the new Act, 13 Car. 3. cap. 2. being not within the general word Treſpaſs, which this Court agreed. 2. Though Execution be ſued forth, if Error be brought before it be executed, it is a Superſedeas, by Twiſden, though the Sheriff is in no contempt, if he have no notice; which Maynard, for the Defendant, denyed: But, by Windham, ſo long as the Money is in the Courts power, they have of late time reſtored the Money; but contrà if the Money were delivered to the party himſelf by the Court againſt Twiſden.

The King and Edwards *againſt* the Bailifs of Allborough.

(23) Mandamus.

STroud Senior excepted to Return of a Mandamus to reſtore Edwards Capital Burgeſs there, becauſe only one expreſs Notice appears made, the reſt wanting place, &c. 2. The Summons varies in days of Appearance. 3. There is no cauſe ſhewed of removal, but only abſence upon Summons, which is needleſs, by Windham, and is to condemn the party unheard. 4. Twiſden excepted that being incorporate by 4 Jac. they cannot have a Court, time out of mind, as is alledged before, the Bailiffs and Capital Burgeſſes Rule naught.

Adjornatur.

Siderf. 79 pl. 5. Shepherd *againſt* Wakeman.

(24) Slander. H. 13 & 14 Car. 2. Rot. 473. 2 Brownl. 151. pl. 141. Owen. 30. Hub. 62. pl.

JOnes for the Plaintiff, That the writing this Letter is Actionable, the Defendant having no Title himſelf, as 4 Co. 18. Gerrards Caſe, nor probable cauſe of ſpeaking ſuch words, 20 Eliz. Sir Fr. Moor 187. pl. 334. Wildgooſes Caſe According to this difference: And had there been in the caſe at Bar any expreſs Averment, that he knowing himſelf to have no colour of Title, it had been without doubt within Gerards Caſe, and here falſo & malitioſé doth ſupply it, and Tantamount being found by the Jury, Heard *againſt* Read, Pl. Com. 52. Stiles 335. pl. 712. in Action upon the caſe counting, H. being produced as a Witneſs, the Defendant ſaid that he had taken a falſe Oath, which being in a Court of Juſtice, had not been Actionable; but the Jury having found it falſò & Malitioſè,

it

it was ruled actionable; and by Allen, none could ever make his own Title, if he may not be excused for such words; but this being malitiosè, cometh not under that excuse; and had this not been proved malitious, the Judge ought to direct the Evidence for the Defendant, for malitious doth imply science. 2. Exception was want of place of writing the Letter, which per Curiam, being not the ground of the Action, is not material; for whosoever had wrote the Letter (it's not traversable) & the delivery and publication is the scandal: But Twisden doubted, because Forgery and Publication must shew place of both. Windham doubted of the want of Averment that the Defendant knew he had no Title, is not fully supplyed by the falsò & malitiosè. Foster also conceived this was done well, there being no other remedy then to be had upon such Pre-contracts, and no publication, and the Man the fittingest person to be applyed to. Twisden conceived the words actionable for the ill consequence, and it being private, must be left to God, and not to be divulged unless it be proveable; and scienter is needless in this Case, being private betwixt them two; otherways in title made to Lands, &c. Allen, It hath commonly been ruled in Action upon the Case for selling and warranting a Horse that was none of his, to say that knowing the Horse to be anothers, or quod fraudulenter vendidit, both which ways the Court agreed sufficient, and that the fraudulenter supplyeth the scienter; but the best way is to say, that knowing it was none of his. Adjornatur.

Stiles 310. pl. 668. 2 Cr. 474. pl. 6. 2 Cr. 630. pl. 3. Goldsb. 123. pl. 8.

Beaver *against* Binion.

(25) Bail.

COunt in Michaelmas Term, and Bail in Hillary, a Scire Facias, by Wild the Kings Serjeant, cannot be brought upon such Bail, being not the same Term of the Declaration entred; but the Writ being returnable in Michaelmas, and Bail in Hillary, and then the Declaration was mended, and made of Hillary, and then a Plea and Verdict is had, which per Curiam is well enough. 2 Cr. 384. pl. 13

The

The King *against* Chedle.

(26) Scire Facias. WIlliams for the Ter-tenants in Scire Facias ad audiend. Errores of an Attainder, conceived, That though the Sheriff Returns there are no Ter-tenants, yet the Ter-tenants may come in and answer by suggestion, and plead; which Allen denied, but conceived he ought to make Affidavit of his Case, else he cannot come in to plead, by Twisden, contrà by Windham, it being only a Summons, which the Court agreed, if they can make themselves Tenants.

Error, Br. 90. Hodges *against* Hodges. Ante. 1

(27) Error. ON 3 Cr. 586. Pawlet *against* Christmas, not returning 24. if there be no full Jury, is naught; but not so where there is a full Jury appears; which Windham agreed; and that the party shall not be put on the inconvenience of a Tales. Twisden had been of the same Opinion, till 3 Cr. came out, and this is but a Mis-return, expressly helpt by the Statute, which Foster agreed, Sauchel *against* Stocker. Adjornatur 99. pl. 161.

Harrison *against* Knight. Ante.

(28) Arbitrement. IN Debt upon Bond, the Defendant pleads performance, and sets forth the Award: The Plaintiff assigns Breach in Non-payment of Money; and the Defendant replyes that he did not pay, which is no Issue; Verdict for the Plaintiff, and Judgment in C. B. and Error brought here after Damages and Costs assess, the Court reverst the Judgment; but had it been upon any such point before, and not to affirm or disaffirm the Judgment, they would have awarded a Repleder. Post.

Knight

Knight *against* Dauncer. Ante.

Thurſday, June 5.

FInch Solicitor for the Plaintiff, conceived no ground to ſtay Judgment on the Act for Miniſters, 12 Car. 2. Or if it ſhould be urged it were no Act, yet the poſſeſſion of the Plaintiff is a good Title againſt the Defendant, and the Act, as found, doth only confirm Incumbents of lawful Patrons, not againſt ſuch as were Incumbents by a prior or better Title; and that the Plaintiff is ſuch an Incumbent, though preſented by Recuſant, is Evident, though he agreed the Preſentation void: So Hub. 302. where the Ordinary will preſent as pleno Jure, whereas he hath only Collation, this may by the King be made void, or not, but as to all other perſons then the Patron, he is a lawful Incumbent, and his Charge by confirmation of Patron and Ordinary, would have bound the Succeſſor; and this is out of the great Piety, Juſtice, and Moderation to the Church, and Indulgence of Induction to ſerve a Cure; and as Preſentations void by Law, ſo of void by Statute, and good againſt all other perſons: The ſtrongeſt Caſe of Symony makes a Plenarty againſt all perſons, but the King, and he may ſue for Tythes notwithſtanding Hub. 168. which is no Law, becauſe he is not a Symoniack till Conviction, P. 16 Jac. Segar *againſt* Cole, Adjudged in B. R. that Symony was not pleadable to Suit in the Spiritual Court for Tythes, Hut. Heylins Caſe accordant by Suggeſtion before Conviction. 2. The Stat. 3 Jac. is nugatory in that Clauſe that diſable Recuſants to preſent, being made Excommunicate before; nor are the Univerſities entitled as full Patrons, but to ſupply the defects of the Incumbent, and ſo it tends not to make the Incumbency wholly void, 10 Co. Chancellor of Oxons Caſe is in this point, and its at the rightful Patrons Election to make it void, or not. 3. The Clauſe of diſabling in 3 Jac. is not found 3 Jac. 4. is a general Law that giveth the Penalty to the King; but Cap. 5. is particular, and muſt be all found, as in the Chancellor of Oxons Caſe. And he that ought to be named in a Quare Impedit, is ſuch a rightful Incumbent as cannot now be removed.

(29) Incumbent.

Hub. 165. Yelv. 7.

3 Cr. 642. pl. 42. contrà.

(2.) Allen for the Defendant, That the Plaintiff hath no Title, the Inſtitution and Induction, as well as the Preſentation, being void by 3 Jac. cap. 5. it being an act of diſability in the Preſentor, whereby the Foundation of the Ordinary is deſtroyed; and the meaning was not only to make the Preſentation

sentation alone, but all building thereon void. 3. The Statute giveth the Nomination, Presententation, and Collation to the Universities, which would be fruitless if the Incumbent should be yet full till removal: And the Statute was meant, as well to make the Incumbent, as well as the Patron or Donor incapable. Huberds single Opinion in Gawdies Case is against all Reason, That this Induction should amount to a Collation, because this he doth as Ordinary; the other of Institution is but a Ministerial act, founded on the Presentation, as to the Interest and Institution made upon Presentation of one that had no Title, should not hinder the Ordinaries Collation; where the Ordinary hath a right of Collation it maketh Plenerty, but where he doth it only as having Curam Animarum, it giveth no right, but a provisionary possession, whereby he may have right to Tythes or Profits, but hath no Freehold or Interest in Law whereby to maintain Ejectment, or to have Quare Impedit brought against him, Stephens *against* Potter, and that such an Incumbent is capable of a confirmation, 11 H. 4. 9. is mistaken by Hub. that being upon a Collation made pleno Jure, in which Case Induction is made by another. 2. The Act for Confirmation of Ministers is private, and found by the Jury to be an Act of Parliament, and the Court are not bound to take notice of it ex officio; and this Act doth give a Title in Law to the Defendant, and the naming of the Incumbent is prudence, as of any that claims Title; but he that hath right is not thereby concluded or put to a Quare Imped. And supposing the Plaintiff had a good title, and the Defendant none, yet that Clause of the Act that inables Incumbents in possession to hold till 20 Dec. 12 Car. 2. takes away the Plaintiffs title, for the Lease is made 25 Apr. and the Action is brought in Michaelmas Term, which is before the right accrued. Finch said this Act doth not take away the Jurisdiction of this Court. Windham conceived that the naming him giveth him no right, but may be of any disturber whatever; and the Lease and Ejectment being made 23 April, and the Action not brought till Michaelmas Term upon foundation before the Act 25 April, is ill only for Damages, because the Plaintiff had a good Title before. And by Twisden, since 25 Dec. the Title is made, as at first, good, which the Court agreed; and also that a Parishioner may plead Symony in bar of Debt for Tythes, 1 Inst. 344. The reason why Collation puts not out of possession is, because its only a provisionable care commenda Semestris, and doth not enable to sue for Tythes.

If the Recusant conform before Presentation made, he himself may present, Tr. 11 Jac. B.R. The University of *Oxon* against *Basset*. Grant. Beard.

Adjornatur.

Knot

Knot Executor of Thomson.

ALlen prayed a Mandamus to the Arch-Deacon of Canterbury, to command them to allow proof of a Will after Administration committed, which the Court denied, and the party may appeal, though no Sentence but only an Interlocutory Award be made. But, by Windham, the next of Kin may have a Mandamus, if the Ordinary refuse to grant Administration. (30) Ordinary.

Hodges *against* Hodges. Ante.

Tr. 13 Car. 2. Rot. 460. Error Br. 90.

WIld Recorder excepted that the Venire Facias was Teste out of Term 23 Febr. and so void, not helpt by Statute, which the Court agreed. Judgment affirmed, Nisi. (31) Error.

Lord Dunbar *against* the Commissioners of Sewers. Ante.

ON 19 Jac. Hall, &c. *against* Mason in the Dutchy-Chamber, on a Commission of Sewers, they ought to shew how much a Wear is inhanced; so here, the quantity of a Gettee ought to be ascertain'd. 2. That the Commission of Sewers being in English, Tr. 5 Jac. 12 Co. 31. without an Anglicè, is void, P. 9 & 14 Car. 1. B. R. which Witherington, for the Plaintiff, heard, but could not find, were both adjudged accordingly: But, per Curiam, this is certain enough, being after Verdict, and the Plaintiff ought to repair it first, especially, by Twisden, the Presentment being admitted, and not shewed in the Plea to it. (32) Sewers.

Lockier *against* Smith. Siderf. 79. pl. 3.

THe Obligor takes Administration to the Obligee, and makes his Executor, and dyeth: This by Stroud for the Plaintiff, as Sir J. Needhams Case, 8 Co. 131. is no discharge of the Debt. Wild for the Plaintiff, That the Debt is discharged, in regard the Obligee is not aver'd to be indebted to any, for else he agreed it shall be Assets, but now it appears to be as a Gift of the Obligee, at least its a personal thing, and by Suspension is extinct; which the Court denies, unless it had been suspended by the act of the Obligee; and though the Obligee owe nothing, yet the Administrator shall (33) Extinguishment.

not have them, though Executor, or Administrator of Executor should have had Debts of the first Intestate, and not the Administrator of the first Intestate; contrary of Executor of Administrator of an Administrator. In Debt upon an Obligation by an Administrator de bonis non, against Executor of Administrator of the first Intestate, averring the Administrator and the Obligor were the same person.

Judgment for the Plaintiff, Nisi.

Siderf. 79. pl. 4. Hammerton *against* Nevill. Ante.

(34) Approvement.

IN Trespass, the Defendant justifies in three Acres for Common. The Plaintiff replyes that two of them for enlargement of Curtelage be inclosed; which, by Jones, must be for husbandry or necessity, not for all purposes; also it ought to be said, that the enlargement was for Habitation. 2. This priviledge remains only so long as the Land remains Common, not when its reduced to its ancient Nature of Pasture. Allen for the Plaintiff, It's not of necessity by Westm. 2. to say its an ancient House, but if it were, the Defendant ought to shew that it was erected de novo; the want of the quantity of the Curtelage to his Habitation, to which he thus took in two Acres, is not material by Allen: But this Twisden doubted, unless the Demurrer confess it was necessary. And, by Windham, the House ought to be said ancient, else the necessity is of his own making, and all Circumstances ought here to be expressed in the Replication. Foster and Mallet conceived it ought to be ancient, and for Habitation also, and not only for pleasure or convenience, which the rest agreed, as a Hop-Ground or Park is not within the Statute; contrà of a Sheep-Cote. Judgment for the Defendant upon demurrer on the Replication.

See 22 H. 6. 10. contrà per Bing.

Western *against* Hartnall. Ante.

Hill. 13 & 14 Car. Rot. 1554.

(35) Prescription.

STroud Jun. for the Plaintiff, That the Prescription quod Occupatores have used to repair it, well enough in Action upon the Case for not repairing a Wear, being an Easment in alieno solo, Hub. 118. & Rast. Entr. 110. H. 37. Eliz. Owen 71. Goodway *against* Michael, the like in Avowry, Fitzh. 66. This Prescription is but an Inducement to the Action, Wingate *against* Gibs, Paschæ 14 Car. Custom 3 Cr. 445. this Prescription is help'd by the Statute of Jeofails.

Windham

Windham, The usual pleading of such as have Close adjoyning is quod Omnes Occupatores, because it lyeth not in his knowledge, which the Court agreed. Jones cited Roberts Case, 5 Co. to the contrary, when any Charge is laid on another that hath the Fee, without any benefit to him, the Wear was alledged to be cross the River, prope terram, call'd Heath-field, the Occupiers whereof, time out of mind, &c. which the Court agreed well enough, 1 Cr. 419. though not in the Soil of him that is to repair. Judgment for the Plaintiff, Nisi.

Rogers and his Wife *against* Cocke.

THat H. is a Bawd, and a pocky Bawd, and I will root thy Whores out of thy House. Twisden conceived them not actionable; Curia contrà. Judgment for the Plaintiff. (36) Slander. 3 Cr. 643. pl. 44.

The King *against* Sir Henry Vane. Ante.
Friday, June 6.

HE was Indicted for sitting, with others, to consult the Kings destruction, and to get the Government to themselves, 30 May, 1659. The Attorny General, Palmer, began with Evidence from the Treaty at the Isle of Wight, 1648. after with the Acts made against Kingly Government, and management of Votes of the Councel of State for the Navy, until 1653. And after in 1659. sitting in the Committee of State, and managing the Land Forces, issuing Warrants for them: And in the Committee of the Councel for Government, he contrived the Alteration of Government, and raised the Opinion that the people had made Trustées, and that these were unalterable; all which, with procuring Arms for his own Regiment, amounting to a levying War actually. Sir Henry urged, That no person in being then claimed the Kingly Government, but all things were done in the Name of the Common Wealth, and so matter of Law might thereon arise; which the Court conceived would not, being not material, notwithstanding. 3 Inst. 7. by Sir H. is meant of a King in possession; but, by Maynard, the Kings Serjant, which Windham agreed, there must be a King Regnant, there being no Interregnum in Law: But by Sir H. they may be said Kings that have the Authority. Finch conceived this the Old Priest, Watsons Doctrine, who thought to oppose King James, being not actually in possession, was no Treason; and this was of their own doing, who only usurped the Name of a Parliament: And had it been so, yet that's no Sanctuary (37) Treason.

12 Car. 2. c. 1.

for Treason, but this Court may trye them; which the Court agreed. 2. Sir H. urged also, that the Parliament in being 13 Aug. 1642. was not dissolved by the Kings death; The Act 13 Car. 2. cap. 1. §. 3. of preservation of the Kings Person, mentioning only that its thereby dissolved, and the equality of the three Estates in Soveranity is that which makes it Political, as Fortescue: And for this end, Deut. 17. Kings were constituted. Finch Solicitor, the King cannot give away that prerogative of calling and dissolving Parliaments, 4 Car. Thursbay *against* and they are undoubtedly determined by his Death: As Commission of Sewers, appointed by 13 Eliz. 9. not to end in 10 years: He doubted not, but Parliaments may commit Treason. if an unjust thing of them may be presumed contrary to their Allegiance and Customs of Parliament: The contrary Doctrine followeth from a venomous Principle of Coordination, which is against the Oath of Allegiance; for if men in Parliament will speak desperate things, its not to be privileged by Parliament: And the Kings being out of possession, is but an Aggravation of the Treason. Windham, I see no colour, why by being continued longer then usual, they should have more power then another Parliament, which is but the Kings Counsel: And though its not to be dissolved, but by another Act, yet by the Kings Death it is determined in fact, as Marriage enacted not to be divorced till another Act, yet it is done by death; and betwixt King and Parliament is a like Conjunction. And had an Army in the Life of King Charles the first, forced and packt any of the Parliament, it had bee a Suspension of a Parliament till it might resort again to its freedom, as is the Law of all Nations. Twisden ad Idem, it had been without Question, had not the Act been made that it should not be dissolved; which word is not extendable to a discontinuance; so it saith, no Act done or to be done shall dissolve it, his death is no such Act: Mallet & Foster ad Idem, it was only to treat Nobiscum, which is meant in the Kings Political and Personal capacity, and so determined by his death, whereby those capacities were sever'd, which to do, or suppose, by any other, is the Greatest Treason, the law making no such distinction; but eo instante, that one dyeth, the other is King. Either House may commit Treason, though the Parliament, viz. King, Lords, and Commons cannot. Twisden rebuked the abominable distinction of the Kings Capacity; and, per Curiam, the endeavoring to keep the King out, though he be not in possession, is Treason; and Counsel, by Twisden, is not to be allowed in things that tend to subvert fundamentals, as Stories Case. Dy. Post.

Coroner although Elect on the Kings Writ ceaseth not by his Demise, because Elect. 2 Inst. 175.

1 Inst. 342. Seisure by Com. of H. 8 determined by his death, albeit by Statute.

Williot

Williot *against* Dennis.

Saturday, June 7.

IN Trover for several Goods, inter alia pro 400. virgat. texti de Serico & Pilis confecti, which, by Jones, is uncertain, no species being shewed of it by any Anglicè Stuffs; but, by Twisden, Hill. 1659. Trover for Hydes held good enough, Pool and Cotley, so of Stockings; and so he conceived here. Windham ad idem; Possibly there is no proper English word for it, and this description of the Matter, being a new Stuff, is sufficient; which Foster and Mallet agreed. (38) Trover.

Judgment for the Plaintiff.

Gayton *against* Raydon.

THe Chauncellor of Oxon demand Conusance of the Action, being Debt betwixt the Beadles of the University, by Special Warrant to Attornies, and brought into Court by Rule, which being put in form of Plea, the Court granted, Nisi. (39) Jurisdiction.

Armidel Executor of ...., *against* Trevill. Ante.

ALlen for the Plaintiff, That Not guilty of the taking is no proper Plea in Replevin, the Caption and Deteyner are several, and the one may be lawful the other not; therefore to say Not guilty de Captione within six years, is most improper: But, by Baldwin, this is only informal, but doth amount no Non Cepit, which is the proper Plea in Replevin: Non Culp. in Debt on 2 Ed. 6. may be naught on Demurrer, which the Court agreed; but is good after Verdict. Windham agreed the Plea good, and amounted to Non Cepit, so Foster and Twisden: But, by Bear for the Plaintiff, 12 Ed. 4. 5. Replevin F. 21. the Deteiner, as well as that Caption, is to be answered; and in Recaption the injustè is applyed to the Detinet, therefore it must be answered; and though Non cepit generally be a good Plea, yet this special Non cepit within six years, is ill, and negative pregnant, which the Court agreed on demurrer. 2. Baldwin for the Defendant, Replevin lyeth not by Executors of a Caption in the Life of the Testator, 6 H. 7, 8, 9. but they ought to have had Trespass or Detinue, especially the property being alledged in the Testator, Regist. 94. Allen for the Plaintiff, that at Common Law this Replevin (40) Replevin. It lieth not against them 45. pl. 61.

Replevin lyeth, the property continuing to the Executor, though they might have had Detinue; but this Action as Trover, or Quare Impedit, or Ravishment of Ward, are undoubtedly within the Equity of the Statute, which the Court agreed, in omnibus Replevin, is founded on the present property, not on that at the time of the Caption.

Judgment for the Plaintiff.

Hutchinson *against* Clayton.

(41) Attorney. WAnt of Warrant of Attorney after Verdict, is expressly helpt by 18 Eliz. per Curiam, except Twisden, which doubted it.

Marchant *against* Short,

(42) Courts. 2 Cr. 567. pl. 3. ONe must plead Recovery in Inferiour Court especially, and not only quod cum Recuperet, as in the Superiour Courts in Westminster. 2. Error cannot be brought in one Inferiour Court on Judgment in another, per Curiam, but was held erronious.

Borman *against* Hammon.

(43) Bail. Godbolt. 267. pl. 369. IN Scire Facias on Recognizance of Bail in a Writ of Error to prosecute with effect: The Defendant pleads that he did prosecute with effect; whereby the Judgment was reversed quod paratus est verific. and doth not conclude prout patet per Record. for which Cause it was on Demurrer ruled ill.

In Detinue Br. 2. Tarling *against* Dealton. Ante.

(44) Executors. IN Trover brought by Executor, the Defendant pleaded that the Testator dyed Intestate, and that Administration was committed to A. who sold the Goods to the Defendant: To which the Plaintiff demurred, as amounting but to the General Issue, and so was the Opinion of the Court; and so Twisden, it was here ruled in the case of Money said to be delivered as a pledge. Judgment for the Plaintiff.

The

The King *against* Lambert. Ante.

Munday, June 9.

THe Evidence against him was taking a Commission from the Parliament in 1659. and opposing General Monk and Sir George Booth, (which though not one word had been said of the Kingly Interest) was per totam Curiam, held Treason: And though the actual War was made in another County, yet the very Conspiracy and Acceptance of the Commission was held Treason in Middlesex, as was delivered in Evidence to the Jury, that after found him Guilty. (45) Treason. 11 H. 7. c. 1.

Wade *against* Shaw.

Tuesday, June 10.

VEnire Facias awarded returnable Coram nobis, which should have been Coram Rege, was in the Case of Friend *against* Baker, per Curiam, amended after Error brought in the Exchequer Chamber; so the Quæ quidem being less by miscasting the Sum. (46) Variance. Stiles 183. pl. 419.

Foster *against* Foster. Ante.

WIndham was for the Plaintiff the younger Son, and conceived that here is no Use raised by Demise, Grant, Bargain and Sale, and Set over, which Indenture was found in hæc verba; and that it was as well for Affection as Money; and that Margery that sold is yet living: Although this cannot rise at Common Law, yet is it not necessary it should rise as a Use, but the intent must guide: And the Jury shall not conclude the Court when the Indenture is found in hæc verba, which is the ground on which the Court must build. And in this Conveyance is no intent to pass it otherways then at Common Law; and this is the best Construction, not to strain the words beyond the literal words; although anciently this raising Uses was more favoured; but in consideration of Affection, will not raise a Use now, Dyer 302. 40 Eliz. Sherfield *against* Fen; It was agreed against the Opinion of Plowden, that no Use will rise by Grant, Gift, Conveying or Assuring for Marriage, Affection, &c. 1 Inst. 49. a. and especially here being another Consideration mentioned, and the words Demise and Grant are proper words of Common Law; and though (47) Assurances. Pl. Com. 152. 18 Ass. 3. per Thorp & Hill. Moor 101. pl. 247. 1 Brownl. 193. pl. 624.

March. 50. pl. 78.

3 Cr. 254. pl. 27. Hub. 171. pl. 194

Leaſe by ſuch worde is good. Moor 459. pl. 158.

though another conſideration may be averred, yet the expreſs is that which guides the Jury and Judges to the intent, as Harpers Caſe, and the general words, other good Cauſe, do ſignifie little; and Pitfields Caſe is unanſwerable, no difference being betwixt a Demiſe after my Death, and a reſervation to me during life: and in all the Reports, the words of the Conveyance are conſidered, and this can have no other expoſition; Dedi & Conceſſi importing a preſent grant, and ſo nothing in futuro could have made this good: But the intent was neither to convey it at Common Law, nor by Uſe in this Caſe, being only Articles of Agreement, referring to a future Conveyance: This intent appears by the frame of the Conveyance, and no remedy by diſtreſs, &c. will lye for this Rent, but only Debt on the Agreement: Alſo the Feme did not intend to have a bare Eſtate for Life, but might, as Anceſtors uſe to do, be unſubjected to waſt, and that ſhe was to have Matthews Barn, is not material, it not appearing that it was Williams her Husbands, or that ſhe was dowable of it, and ſhe was to have it, which refers to a future Act: and the meaning appears in the after Feoffment to the younger Son, Leſſor of the Plaintiff, which is a good Conveyance.

2. Twiſden ad Idem: That no uſe riſeth to Matthew, though the Conſideration be well and fully found by the Jury, yet it appears to be made eſpecially for 20 l. Dy. 140. both ſtand well enough together, German *againſt* Johnſon, Rot. 163. B. R. 1649. Demiſe paying Debts and Legacies, and his Eſtate was found worth but 5 l. and his Debts were 40 l. whereby it was adjudged a feeſimple paſſed; General words in a Deed may be uſed as beſt for my advantage, but with due Conſideration of Circumſtances, as Dedi, Conceſſi, is a Confirmation: So grant of a Reverſion, as Foxes Caſe, for Money, may be uſed as a Bargain and Sale; and Sharingtons Caſe Dy. 96. Pl. Com. 391. The Covenant is not that which raiſeth the uſe, but the intent: and Manxels Caſe, when divers Conſiderations are expreſſed, it may be uſed either way, and ſo is Bedells Caſe: And to judge when theſe general words may, or may not raiſe a uſe, the intent of the parties is conſiderable, which if to be executed at Common Law, ſhall never be raiſed as a uſe; ſo was Teb and Poplewells Caſe againſt the Opinion of Popham and Vinians Caſe, Dy. And here Matthew conveyed nothing but what diſcended from the Father, and it doth not appear that this Barn is ſo: Wherefore the words are general

ral in a Deed, and there is a good Consideration, and it stands in Equality to be passed at Common Law, or by use there: If only want of Ceremony be to pass it one way, it may pass another; and Dedi & Concessi in consideration of Marriage to my Son will raise a use, C. B. H. 1655. Rot. 1578. Sanders *against* Savill, as well as Covenant to stand seised, as Sharingtons Case: So Wats *against* Dixe, Stiles..... Bargain and Sale in consideration of Affection, and that she had disbursed Money, and provided necessaries for him, this passed by Bargain and Sale though the Consideration were past. But it was said by Rolls, that if it had not passed by Bargain and Sale, it would have passed by Covenant to stand Seised, being both the same way; so 2 Cr. Osborns Case and if Cestuy que use joyns with Feoffees in a Lease, its the Lease of the Feoffees; but if the Deed cannot operate that way, as is expressed, if all Circumstances be executed, it shall not be helpt, so Pitfield *against* Pierce, Rot. 430. March Rep. 13 Car. 1. by making it as a Covenant to stand seised; so Bulkly *against* Simmons, Hub. and take this (the reserving) as a Reservation or Condition, or Exception, 38 H. 6. 38. it is repugnant to the Deed, had it been Executed as a Feoffment: And so this Conveyance being void in the Fabrick, shall not be supported; as Covenant to stand seised; and in Gallards Case had the Declaration been made by Deed it had been void 3. Mallet ad Idem. 4. Foster said the Opinion of Walmsey was agreed by all the Judges to be law, that Bargain and Sale to his Son passed nothing, Ward *against* Lambert 37 Eliz. and agreed with the rest for the Plaintiff. Judgment for the Plaintiff. 3 Cr. 394. pl. 19.

In Discontinuance Br. 38. Stephens *against* Bretheridge.

Wiodham, The Case is, Sir Francis Worsly seised in Fee in Consideration of Marriage, Covenants to stand seised to himself for Life, Remainder to Hester, whom he intend to marry, for Life, Remainder to the Heirs-Males which he shall beget on her, Remainder to Sir Francis Son by another Venter before in Tayle, Reversion in Fee to the Father; then the Father, and Hester his Wife, levy a Fine to the use of a Daughter married to the Defendant, then they dye without Issue male: And Judgment ought to be for the Plaintiff, viz. Sir Francis the Son. That this Fine is no discontinuance, this Estate being a Remainder in the Heirs Males it is not executed, Lit. 578. but a distinct Estate from the Tenancy for Life, severed by the interposition of the Femes (48) Siderf. 83. pl. 10.

Estate for Life, and though the Limitation be to the Heirs of the same persons, that had Estate for Life, yet they are not present Tenants in Tail, by reason such a Constitution would overthrow the whole frame of the Conveyance, to make the Wife Joyntenant with the Husband, or to drown her Estate for Life, which cannot be here, no moieties being here executed, they being Baron & Feme, Lit. 525. Confirmation to Baron & Feme (she being before Tenant for Life) makes them not Joyntenants for their Lives, but she is as before, and he hath an Estat for her Life; so upon a Confirmation to him and his Heirs, her Estate for Life remains distinct Feme; Tenant for Life, the Reversion granted to Husband and Wife and their Heirs drowns not her Estate for the whole, or for a moiety; and so in the Case in Question, had the Reversion, after their Estates for Life, bèn granted to them both, it would have drowned for no part, because it passeth a Reversion only in the degree of a Reversion, being by one and the same Conveyance; and this is not like King and Edwards Case; Lands given to Husband and Wife and his Heirs, is present Estate Tail in possession executed in the Husband, conjoyn'd with the Frèehold in the Wife, in that case was a Feoffment, which is stronger than this Case, which is by Fine. And Peck *against* Charnel, 3 Cr. 827. cometh nearer to this Case; but there the whole Estate was in the Husband, but the present Frèehold was in the right of his Wife, therefore their joyning in a Fine is no Discontinuance; and the principal Case of Bredon, 1 Co. 76. was never denied for Law; and here is no displacing of any Estate neither, but each granteth what they may: But the construction of Bredons Case hath bèn denied in Baker *against* Huckings, 1 Cr. 405. pl. 480. this Conveyance meddles not with the Possession, as a Feoffment doth. And here is a distinct Remainder grantable over, and each passeth what he may, and so the Lessor of the Plaintiff hath a good Title.

(2.) Twisden held that here each Use ariseth by this Consideration, being a Covenant in consideration of a Marriage to be had, he and his Heirs would stand seised, this must execute presently, and so doth. 2. He conceived that the Husband was no present Tenant in Tail, but in Remainder. And 3. this Fine is no discontinuance, as its agrèed it would be, were they Tenants in Tail in possession. 4. This is no displacing of the Remainder: As to the first point, he held that a Use ariseth, being by way of Remainder, Lord Pagets Case. But 2. the main doubt is, what Estate they have, whether a joynt or several Estate; but he held it is not executed in her, which

which he grounded on Littleton 225. For if the Fee-simple would not drown it, neither would the Estate Tail, if this, being by several Deeds, remain distinct, it is as reasonable to be so, being by one Confirmation, 7 Co. 190. 3. This is no discontinuance most evidently, and was resolved without doubt in Pecks Case, and Sir John Davis's Case, 14 Eliz. Hub. 277. pl. 358. Clanricards Case. 4. That here is no displacing but at the Election of him in Reversion, 1 Inst. 325. so is the case of Fines, Sir John Davis's Case, who was Tenant for Life, Remainder to his Wife, Remainder to his Issue male, Remainder over, he had Issue who was Attainted, there it was resolved that these Estates were distinct in the Husband, and not executed, 7 H. 5. 2. and that the Fine of Baron & Feme was no discontinuance: But the Question was, whether the Fine were at Common Law, or by Statute, the Tenant in Tail dying before Proclamation passed. 2. Whether the warranty did displace; and held that it did not, but at Election: And the consequence of these two last points were, That had the Fine been at Common Law, the Remainder had discended to the Issue Attainted, and so the King seised without Office: And here the Lessor of the Plaintiff sealing a Lease, hath put himself out of possession.

(4.) Foster ad idem; But that the Case of Littleton cometh not to this Case, that being only the acceptance of the Husband, which could not hurt the Wife: And where an Estate is limited to A. then to B. if by the same Deed any Reversion be limited to A. the Estate is executed to some purposes, and he conceived to this, and the Use as limited was agreed good to the Feme, if she marry before the Reversion hap, as was agreed in the Serjeants Case in his Call; he agreed him not out of Possession, but at Election. Judgment for the Plaintiff.

1 Inst. 190. and *Wilmots* Reading 159. §. 1.

Thorp *against* Bayly. Ante.

Wednesday, June 11.

IN Action upon the Case for disturbing the Office of a Water-Baily; after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Office anciently was not grantable, time out of mind, by the King and his Predecessors. Sed non allocatur. (49) Officer.

Lord Gorings Case *against* Lacy.

(50) Covenants.

LIttleton for the Plaintiff, prayed that Action of Covenant, after Demurrer joyned in 1656. being long since, might be discontinued, which the Court would have granted, had it never been argued, or had a fatal fault been espied before Argument, the Court would give such leave: But here the Covenant being for a certain Sum of Money, and Utlary pleaded in Bar, because Debt also lyeth, and demurrer thereon, and now pleaded in a new Action in Abatement, the Court refused to grant it.

In Error, Br. 55. Bromwood *against* Eastwicke. Ante.

(51) Execution. 2 Roll. 492.

Yelvert. 6. Tococks Case. 3 Cr. 597. pl. 2. 2 Cr. 73. pl. 2.

SIr Richard Greenvils Case, by Twisden, is express, that on Fieri Facias sued out, and then return'd, as Baud *against* Metholds Case, Dyer 99. that the Goods remain pro defectu empt. by Error or Supersedeas sued out, after that the Vendition is not hindered, but if the Error were allowed before, then though the Sheriff be unpunishable, yet Supersedeas, notwithstanding execution done, shall go, quia improvidè. And, per Curiam, if the Goods be sold, the Money may be brought into Court to be restored to the party, but if not, the Goods may be in specie restored.

The King *against* Sir Henry Vane, Ante, and Lambert, Ante.

(52) Treason. See the form of the Writ directed to the Justices thereon, in Register 182. 27 H. 8. 24. b. pl. 3.

SIr Henry cited Westm. 2. cap. 31. that he ought to have a Bill of Exception seal'd by the Court, and the Indictment to that end read in Latin, which the Court denied, as a thing unreasonable, the Statute not extending to any Indictment, by Glyn the Kings Serjeant, for this is no Supersedeas; but that Judgment and Execution may be had notwithstanding, and so this would be to no purpose, and no Goal-delivery would ever be if it should be allowed. But by Sir Henry Vane, the Parliament have declared that Execution should be remitted in case Judgment passeth; which Petition of the Houses, and Grant of the King, were read. Windham, Did the Prisoner not understand English, it ought to be read in Latin; but no Copy of the Indictment was ever delivered in Latin or English. Twisden, as the rest, delivered his Opinion, that a Bill of Exception is not within the Statute, nor ever heard of; and at Common Law this Bill lyeth in no Case. The Chief Justice having given Judgment, declared that the Petition

tition of the Houſes, was not to be allowed by the King, in caſe the Priſoner were obſtinate, as he had been in broaching ill Documents and Fundamentals. 2. Lambert excepted to the Indictment, that he was named without addition, which was miſtaken. And ſo the Court gave Judgment, and declared him more capable of the benefit of the Houſes Petition then Sir Henry Vane, by his fair carriage: And Sir Henry Vane ſoon after was beheaded on Tower-hill, and Lambert ſent to Gerſey.

Roſe *againſt* Kitchingman.

UPon Verdict for the Plaintiff in C. B. they uſe to enter Continuance only for the Plaintiff, without giving day for the Defendant, which was aſſigned for Error. Adjornatur to ſearch Preſidents. Yelvert. 97 pl. 32. (53) Error.

Windebanke *againſt* Bear. Ante.

Thurſday, June 12.

THe Office was alledged to be ancient, and grantable by the King, time out of mind, to four perſons, who waited in turn each three Months, which were diſtinctly known, and had particular drawing Fées, beſides a part in general to be divided, which was worth above 200 l. per Annum. The Defendant ſhewed that his Months were not the Months the Plaintiff claimed, and ſo no Diſſeiſin, the times being parcel of the Office, as a moveable Inheritance, but no Office being ever granted for certain Months, and theſe Months changed by the Kings ſpecial Command, Non allocatur. 2. It was agréed, that rightful Receiver paying Fees over to a Stranger, maketh no Diſſeiſin; but if ſuch rightful Officer receive in anothers right, he is a Diſſeiſor at his Election that hath a right, as this Clerk, accounting at his ſecond tourn for his firſt, which was the Plaintiffs, was held in Evidence to the Recognitors of Aſſize. 3. It was doubted whether Patentee in Reverſion, Dyer 197. may enter without Office or Scire Facias. 4. It was agreed that Non-attendance of neceſſary Office is Forfeiture; and the King need not Summon the party, but a Recognizance cannot be avoided but by matter of Record. Poſt. (54) Officer. March. 207. pl. 247.

Luſ-

Luſton *againſt* Johnſon. Ante.

(55) Error. Br. 55. 2 Cr. 73. pl. 2. IF Error be brought and ſhewed to the Attorney, Tr. 1659. Baud *againſt* Method, Dobbing *againſt* Druncall, if execution proceed a Superſedeas, Quia 2 erronice may go, Dy. 99. 3 Cr. 597. pl. 2. Moor, pl. 569, the Fieri Facias is the Execution and the Vend. Expon. but proces on it, and if ſued out after the Roll markt for Error, and due notice, all may be undone: But if the Attorney nor Sheriffs had no notice of the Error brought Execution done, cannot be undone, per Curiam, contra Twiſden: But per Curiam the Money may be brought into Court, ſo long as the Cauſe is not out of their hands. Poſt 327. pl. 61.

The King *againſt* Randal.

Friday, June 13.

(56) Pardon. IT was doubted on Special Verdict, whither Tymber cut and ſold by Vendées of the Kings Lands, be pardoned by the Act of Oblivion, or excepted by the words, Goods of the King. And Windham conceived that this was Profits, and not properly Goods. Adjornatur.

Shepherd *againſt* Wakeman. Ante.

(57) Slander. 2 Cr. 4. pl. 4. TWiſden conceived the Action lyeth, by reaſon no Colour appears for Writing it, which ſhould have been in Evidence: And Sciens is not here neceſſary, becauſe the thing lyeth properly in the Defendants Conuſance, as in Action for Forging of Deeds its needleſs, contrà for publiſhing, that 2 Cr. 194. pl. 19. muſt aver quod ſciens that they were forged. And he conceived the want of place of writing the Letter, is Ayded by 21 Jac. the Viſne being at one of the places, and no proper Iſſue ariſing in other place than where the Viſne is. Windham agreed the words Actionable, but not without a Scienter alledged in the Defendant: So Foſter; no falſo & malitioſe being found, but only that the Defendant was Guilty of the writing. Poſt.

Booth

Booth *against* Beard. Ante.

Saturday, June 14.

(58) Error.

AN Original filed the same Term that Judgment be entred, its by course of C. B. held to be sufficient to Warrant a Count before, which was here assigned for Error: But by Twisden, the difference is when the Record of Hillary Term only is certified, and after the Original is certified, as of the same Term, that's good: But if the Imparlance be certified from Michalmas to Hillary, that cannot be Warranted by Original of Hillary Term; which the Court agreed: Judgment Reverst, being the Original appeared to be entred after Imparlance.

Oliver *against* Hardwick. Error Fitzh. 40.

(59) Ejectment.

IF Error be brought in Ejectment before the last Judgment on the Writ of Enquiry, and no Capiatur entred, its Error, by Twisden, and hath been so often ruled.

Adjornatur.

Cooper *against* Gipping.

(60) Covenants. 2 Cr. 383. pl. 11. That in Action of Covenant its good, but such pleading in Action of Debt for rent, is held void.

PLeading of Demise, quod Testatum existit is ill on Demurrer, but Good of an Indenture of Covenants; but both are ayded after Verdict in Debt for Rent on such Demise, per Curiam.

Lufton *against* Johnson. Error Br. 55. Ante 326. pl. 55.

(61) Execution.

WIndham, If Execution be done after notice of Error brought, or the Roll markt, all may be undone, especially on Cap. ad sat. if the Roll be markt before the Writ of Execution sued forth, but otherways not, 3 Cr. Tr. 1649. Baud *against* Method; The Court awarded the Money to be restored to the party, Nisi, the party having notice of the Error.

Smith

Smith *against* Wilcoxe. Error Br. 90.

(62) Error.

WAnt of Pledges to a Writ of previledge was assigned for Error, ore tenus, which the Court conceived well enough, and that the Defendant may pray Diminution if it be false. Sed Adjornatur.

Sinderf. 85. pl. 14. Littleboy *against* Wright.

Hill. 13 & 14. Car. II. Rot. 1484.

(63) Slander. To say of a Justice, or Officer, he took a Bribe, is Actionable without averment that the Officer, or he is Justice. Infrà.

ON the Case of Hornwood *against* Loe, it was moved by Maynard as Error, in Action upon the Case for words spoken within the Jurisdiction of the Court of Marshalsey, by which she lost her Marriage; not saying where this loss was, or where he refused her: He agreed, where the Damnage is only Consequential, as to call a Taylor Thief, by which he lost his Custom at D. This will lye in Inferiour Court; but not so where the Dammages is the Gist of the Action, the Cause of the Action beginning with the loss. Wild for the Defendant in the Writ of Error; the Action is for words, and the conclusion by which she lost Marriage is not traversable, and it appears not where the loss was. Windham, If loss of Marriage happen seven years after the words spoken, viz. That she is a Pocky over-ridden Whore, the Cause of Action begins now, which Twisden agreed; but contrà of a Release made before the Loss happened: And the Case of the Taylor cometh not to this. Maynard conceived this Special loss Traversable; which Windham denyed.

Adjornatur.

Monday, June 16.

(64) Nusance.

AN Information for a Nusance may not be quasht without Certificate of Removal; but this being for throwing dust and durt into the Highway, ad commune nocumentum, not saying that the way was stopt or straitned thereby, the Court stayd process till farther motion, but on Indictment would stay nothing.

The

The King *against* Bowdage.

INformation of Perjury in answer in Chancery on Interrogatories, which were asked touching Bond made by A. which was made as Executor. 2. As the Case of Rud and Win, there is no special Dammage, is alledged, which is not necessary, unless the Information be on the Statute 1 Cr. 180. and Huntleys Case as Commissioners; So this ought to be said sub Magno Sigillo; but per Curiam, its good either way in Indictment. Judgment for the King. (65) Perjury.

The King *against* Evans.

Wednesday June 18.

WOgan moved to quash Indictment of Riot, being at the Great Sessions of C. and not for the County of C. 2. The Jury are not said sworn (ad veritatem dicend.) Nor that they were Prob. & Leg. Hom. Quasht. (66) Peace.

The King *against* Wood.

IN Information on 5 Eliz. 4. for using the Trade of a Barber, not having served seven years: Windham conceived it lay; contrà by Twisden, no more then a Gardiner; but by Wild for the Plaintiff a Gardiner is but a Husbandman, but a Barber by 32 H. 8. 42. is taken notice of in the Statute as a Trade. Adjornatur. (67) Trades. P. 1. Ed. 3. 8. pl. 5. gist. To *Johan.* the Wife of *Jacket* the Barber.

Whally *against* Anderson.

SIr Jeffery Palmer moved for my Lord New-Castle, upon a Declaration delivered two Terms since, when the Parliament was sitting; and the House of Lords ordered his priviledge, being Lessor of the Tenant in possession, which this Court will not allow in Ejectment, unless the Lord be Tenant in possession, though the Lords may by special Order; but however Priviledge be allowed, yet the delivery is good as to this Court, who will not take notice of Priviledge unless due to the Tenant in possession; because else no right should ever be had against Priviledged person, and this Declaration being delivered to a person not Priviledged, is good (68) Priviledge.

enough, and by Twisden & Curiam, the Priviledge is but 20 days after the Parliament.

Siderf. 80. pl. 6. Windebank *against* Bear. Ante.

(69) Office.

WIld for the Plaintiff moved for Judgment in the Assize; The Recital in the Patent to the Plaintiff being, that the four persons mentioned were in possession, is sufficient without averring that former persons were dead, and three of the four being said dead, and the Plaintiff last of the three next Grantees in Reversion, and said to be debito modo Jurat. & admissus, of necessity the two others are intended supplyed after Verdict, Stonehouse *against* 1 Cr. finding him debito modo admissus virtute literarum patentium, per Curiam. Judgment for the Plaintiff.

Harrison *against* Knipe. Ante.

(70) Damages. 3 Cr. 497. pl. 17.

ALlen for the Defendant, There is by this Plea Non debet and Issue, a good Confession of the Debt and the Damages, when assest by the Jury, when the Court adjudgeth it, it's quasi an assent, especially in this Action of Debt wherein the Court ex officio tart them. But, per Curiam, had the Damages tared by the Court been distinct from those of the Jury, nullo habito respectu, it had been well; contrà here when the Jury tart such Costs and Damages as the Court should. Judgment reversd.

Perkin *against* Underwood.

(71) Rents. March. 104. pl. 178. an Assignment after Distress extincts the Rent before remedy. Stiles 388. pl. 852. 2 Cr. 126. pl. 13.

IN Action of Debt for Rent, Defendant pleads tender & uncore prist; The Plaintiff having received the Money, replyes, That he had not tender, and a Verdict for the Plaintiff. Allen moved in Arrest of Judgment, That the Writ was abated by the acceptance of the Money, which the Court agreed, it not being possible to proceed for Damages after the principal Money received.

The

Sidert. 86. pl. 15. The King *against* Trinity House. Ante.

WIndham would not deliver Opinion that the Grant was void, or that they may not take Sand, notwithstanding the second Grant; but he conceived the Plea insufficient; but yet said, the pleading by Give, Grant, and Confirm being synominous, is well enough, there being no precedent Grant before; so of a Deed that might Enure as Bargain and Sale, or Feoffment by Enrollment, or Livery at Election, may be used every way. The King *against* Bridges, M. 17 Jac. ruled accordingly on Exception taken to a Quo Warranto: But 1. It should have been said an ancient Office, Dyer 71. 2. It should have been said that the digging of Gravel was used as appertaining to the Office, 1 H. 7. 29. and not in gross, for the things claimed must be fixed together in the Prescription, else its but an ill usage; and yet he conceived, this Judgment being in Information, was not final and conclusive, as it had been in a Quo Warranto, which is a Writ Original, 2 Ed. 3. 90. 6 Ed. 3. 11. 20 Ed. 3. in which Aid and Voucher lyeth in the Exchequer, Kel. 141. 139. The King *against* Sir Edmund Bacon, for the Liberties of Bury, this difference was agreed, and so he conceived here. And 4. the Grant of Lastage and Ballastage doth not necessarily suppose the taking of Sand in this place. Twisden held the Grant good, and that Trinity House may well digg in this Soil, & cum pertinentiis signifieth nothing in most Grants, especially in Case of the King; but 8 H. 7. 4. the Grant of an Office alone passeth all things that make up the Office, or belong to it time out of mind, Throgmorton and Tracy, Pl. Com. 156. b. 1 H. 7. 29. 2. He held the pleading ill, concluding no certain way which must be, though it might have been either way at the parties Election, yet he cannot jumble altogether, Pitman *against* Pain, Dyer 115. in Ejectment the same Exception taken; and though this cannot Enure no other way, yet its not sufficient. 3. This must be said an ancient Office, else the Prescription for the King and Queen to grant is not warranted, so Eveſque de Salisbury, 10 Co. 59. Hub. 44. And West *against* Crawly in Action upon the Case for stopping of Lights, on Plea that he had a House in A. and Lights time out of mind; he was of Councel, and could

(86) See Mich. 14 H. 4. 7. pl. by *Hawke* in the Case of *Glocester* Fee, he must conclude one way in certain Avowry, Br. 45. seu 46. but he may use it any way, 14 H. 4. 37. Avowry Br. 47. 9 H. 6. 22. pl. 18. Double Plee, Br. 9. *Dedi & Confirm.* to Tenant in Possession is a Release, seu 48. 2 Cr. 605. pl. 33 22 H. 6. 10. pl. 13. by *Pole, semble.*

18 H. 6. 3. pl. 2. by *Ascough*, so is 6 Ed. 3. 49. b. pl. 43. yet in wast, *H.* pleaded Variance *Estate del Lease J. S.* confirmed by the Plaintiff, and held good in a Plea in B. 9 Ed. 3. 9. pl. 22. 2 Co. 36. in the Kings Grants, various words may be expounded as best for the King, 49 Ed. 3. 23. pl. 8. by *Belknap*, on private View of such Deed, the Court demanded how the Plaintiff would use it, 8 Ass. 7. March. 55. pl. 84. 22 Ed. 4. 38. b. in Estates Br. 46. 46 Ed. 3. 26. b. pl. 13. 26 Ed. 3. 64. seu 10. b. pl. 7. Pl. Com. 86. 154. 254. 2 Brownl. 291. pl. 224. Avowry F. 60. Yelvert. 132. pl. 187. So of several Pleas, if *H.* replys singly on one, its good, 17 Ed. 3. 22. by *Pole*, as to say he was seised only in Tail, and that he entred and enfeofft *J. S.* with warranty, is not double if *H.* do rely on the warranty, and use the other as inducements only, 24 Ed. 3. 75. b. seu 53. b. pl. 98.

never get Judgment for the Plaintiff on such Count after Verdict, but was fain to compound it. And 4. it must be said as appertinent: And 5. the right of the Case never cometh in question here, being but an Information, not a Quo Warranto. Mallet contrà. Foster agreed with Twisden in omnibus, and that the Grant doth not warrant Digging in express terms, Lastage and Ballast, being general terms, which may be satisfied without digging, and therefore the Soil of the Thames being the Kings, it must be specially said incident or appertinent, or the Grant thereof specially pleaded.

DE

DE TERMINO Michaelis,

14 *Car.* II. *B. R.* Die Jovis, 23 Octob. Anno 1662.

Foster *Chief Justice.*
Mallet,
Twisden,
Windham.

Oliver *against* Yeames, in Debt Br. 100. (seu 99)

(1) IN Action upon the Case on promise, Allen moved in Arrest of Judgment, the Count was of an Agreement for a Fine of 60 l. to make a Lease, and in Consideration the Plaintiff would pay 60 l. to the Defendant, by such a day the Defendant would deliver up the Lease thereon, and quiet Possession to the Plaintiff, within a week after the day of payment of the Money, and assigns Breach in not delivering up Possession, and doth not aver the 60 l. was paid. Twisden, on mutual promises an averment of performance is needless, contrà where one is to be done on the other, which the Court agreed. Judgment staid.

Assumpsit. March. 75. pl. 114.

Lewis

Lewis *against* the Lord Fitzwilliams.

(2) Execution. MAynard moved to set aside Judgment had in Scire Facias into London with two Nichills, without notice to the Defendant, being on Judgment had twenty years since, and the Debt of A. being Bankrupt was assign'd and pleaded by the Defendant as his Bail to the Assignees of the Commissioners, which the Plaintiff knew. But, per Curiam, being according to the Course of Court, it shall not be vacat; and though Error cannot be brought, yet the Defendant may have Audita Querela; but the Court ordered the money taken in Execution to be brought into Court, and stay till the Audita Querela determined, so was the Case of Barcocke *against* Thomson. Post.

The King *against* Burgess, &c.

(3) Restitution. WInnington moved for Restitution, the Indictment of force being found the last Term, and removed hither, and no prosecution till now, which the Court granted. Nisi.

Bellas *against* Nicholls. Ante.

(4) Error. THe Court awarded an Attachment against the Mayor of Banbury, &c. for refusing to allow a Writ of Error when the Plaintiff in Court disowned it, which Allen prayed might be taken off, and time given to make a Return, there appearing no Contempt, though the Mayor having taken Security of the Defendant, (who affirmed he had a Consent) to save the Mayor harmless, which the Court granted; but the Writ must be Returned, how faulty or erroneous soever.

Siderf. 78. pl. 1. Lathwell *against* Fisher.

Friday, Octob. 24.

(5) Covenant. IN an Action of Covenant on Bottomree, that a Ship in the Thames should go a Voyage to A. in Spain, et non directe vel indirecte deviaret. To which the Defendant pleaded general performance; and Barrel excepted on Demurrer, that it was ill, it being a negative Covenant, to which the Court inclined; but that if the Covenant were intire, and had been only to proceed directly to A. and not to deviate it, had been a sufficient Plea. Adjornatur.

Nota,

NOta, By Maynard the Kings Serjeant in Chancery betwixt Gee and Spencer (which was agreed by all the Bar) that in Action upon the Case at Common Law, or Bill brought by the Son upon Marriage, on Agreement made by the Father, the Father may be a Witness, though he also might have had the Bill or Action. (6) Proof.

IN Action upon the Case on promise to pay Money for Beasts sold, the Plaintiff Counts in the Marshalsey, that the Defendant was indebted infrà Jurisdict. and doth not shew where the Sale was, which per Curiam is Error. Sed Adjornatur. (7) Jurisdiction. By which she lost Marriage, not shewing where good.

Wats *against* Philips. In Condition Br. 5.

ARbitrement that the Defendant shall Seal and Deliver a Demise to the Plaintiff or his Assigns. The Plaintiff assigns Breach, that Demise was not made to the Plaintiff, not mentioning that it was not done to his Assigns, which by Winnington is ill, as the Case of Trevor *against* Elmes out of the Exchequer Chamber, 1658. But by Twisden, the Case of Trevor was held well enough, and Lease cannot be made to Assignee, unless he be particularly named; but its well enough made to him and his Assigns, as Chapman *against* Dalton in Pl. Com. 286. b. and it is not intended to be to the Plaintiff, or whom he shall name. 2. It was to Seal and Deliver a Deed, Anglicè a Demise of Freehold; which, by Winnington, is not sufficient to pass the Estate, 8 Ed. 4. 11. but Non Allocatur; for it is at least at will, and so long as it continues the Rent must be paid, and the intent is here to be observed also. And here the Defendant pleaded General Performance; and after Verdict for the Plaintiff, this was moved in Arrest of Judgment, and the Rejoynder was that he did Seal and Deliver accordingly, which the Court conceived well enough. Judgment for the Plaintiff. (8) Arbitrement. Condition to pay to Heirs or Assigns, may be paid to Executors of Feoffor, but must be only to the Heir of the Feoffee. 1 Inst. 210. Arbitrement to pay to J. S. an Estranger, or his Assigns on his Death, shall be paid to an Administrator. 1 Leonard. 316. pl. 443. Hub. 9. pl. 19. Payment to be to such person as H. shall name by Will in Writing, shall not be to

Executors. Tender to Executors of Feoffee is sufficient on Condition to pay to him, his Heirs or Assigns. So is Dyer 131. pl. 50.

Brian

Brian *against* Fits-Harris.

(9) Pope. IN Error out of the Marshalsey on Judgment on Demurrer on the Evidence, for not producing the Writ or Copy of Capias out of B.R. upon arrest on promise to pay Debt due from the Colledge of Jesuits, if the Plaintiff would forbear Arrest of Hanmer, (not shewing where, or that he was) one of the Colledge, and should never molest any of them, Twisden conceived both Error, and that they could not take notice of this in Inferiour Court. Adjornatur.

(10) Slander. ACtion upon the Case quod Crimen suspitionis feloniæ ei imposuit; Stroud Jun. moved in Arrest of Judgment, that the Action would not lye; but Curia Contrà.

Judgment for the Plaintiff. Nisi.

(11) Wales. THe Court refuse to Award a Prohibition to the Court of Marches, all Presidents being only to the party himself, but after granted it, Quia Comitatus Anglic. upon motion of Smith of Glocestershire.

Saturday, Oct. 25th.

(12) Tryals. SIr Ralf Bovy moved for Tryal at Bar, which was opposed by Wild Recorder for the Defendant, because the Plaintiff had layn still two years, and had not given two Terms notice; but by Allen, the Defendant is person privileged, and so they could not proceed sooner; and this differs not from Injunction in Chancery, whereby if the Defendant be hung up, such notice is needless, it being his own default, to which the Court enclined: But being a special Case, day was given to shew cause against the Bar Tryal.

Manby

Manby *againſt* Scot in Exchequer. In Contract. Br. 19. Ante.

WIndham for the Defendant obſerved on the Special Verdict, that there was a reaſonable Evidence whereby the Jury in Guildhall might have found an Aſſumpſit of the Husband, as that ſhe offered to Cohabit, that the Husband allowed her no Maintenance, that the Wares were neceſſary, and ſold for reaſonable prices. But on this Special Verdict the Judges here can find no Aſſumpſit, nor Ground the Judgment, had it not been alſo found that ſhe departed, and that the Husband expreſly prohibited, which weighed down his Opinion for the Defendant, as Littletons Caſe in the Chancellor of Oxford, 10 Co. 56. where as much Evidence of fraud, as could be, was found; yet not finding the expreſs fraud, the Court will not find it; as Trover upon demand, and denyal ſhall not be concluded by the Court, unleſs the Jury find it a Converſion. Moſt of the Arguments at the Bar have been founded on the neceſſity, which yet is not naturæ, but Convenientiæ, for by all Laws, in neceſſity men may lay hold on the next opportunity, as to lay hold on another Mans Meat; At leaſt, this doth excuſe of the Crime, and were this neceſſity allowed extream, the Jury could not find it; But the manner and form muſt be ſpecially pleaded, 3 Inſt. 220 Stanford 15 or elſe the Circumſtances muſt be ſpecially found. As to the point in Law, as here found in the beſt ſenſe, the Law doth not enable her to contract to bind the Husband in no Caſe of Sævitia, or otherwiſe of the Husband; Its a Rule of Law, that contract which binds the Husband muſt have Licence precedent, or aſſent ſubſequent; I allow, if my Wife be Houſe-Keeper, ſhe may take up neceſſaries, that being a Licence in Law; and ſuch contracts ſhall be qualified according to his Eſtate; but if the Husband uſe to ſend his Wife or Servant with ready Money, if ſhe payeth it not, but taketh upon truſt, the Husband or Maſter is not chargeable, 11 H. 6. 30, pl. 16. Scots Caſe againſt the Abbot of Fountains; If the Caterer or Manciple take up any thing ad uſum domus, he is bound thereby, * ſo Action upon the Caſe, Br. 5. 27 H. 8. 25. Tathams Caſe, by aſſent ſubſequent ſhe is enabled and Capacitated to contract ab initio, 34 Ed. 1. Debt F. 163.

(13) Baron & Feme. Juriſdiction of Avoutry, &c. of Prieſts, is given to the *Spiritual Court* by 1 H. 7. cap. 4. when the Concluſion is on ſingle point, the Court will doubt no more; *contrà* when *Super totam Materiam.* In Attaint of *payment de Rent de Tertant* at ſuffrance in groſs to Bayly *de Seignior*, make him Tenant at Will, &c. *Dyer* 173. *pl.* 15. 10. Find *Seignior Enfeoffſon heir apparent ne ſerra entend* by *Covin*; 27 H. 8. pl. 22. Verdict muſt be ſuch as the Iſſue may bear. Hub. 103. pl. 132. Verdict find Feoffment as made, and pray adviſe if it be diſſeiſin in Aſſize. Attaynt Br. 69. March. 11. pl. 41. on Alimony allows ſhe may take Goods. March. 80. pl. 129. That Abbe was

Elect by minority on *unque Abbe prend*, is no good Evidence, yet found by a Special Verdict, is good. 9 H. 6. 34 by *Caund.* Bargain of Goods is ſufficient Aſſumpſit found by Special Verdict, though it be found there was no other promiſe 4 Co. 92. b. See of Special Verdicts muſt have Subſtance. pag. 256. 2 Cr. 503. pl. 20. In an Informotion, the point muſt be preciſely found Uſury or Perjury, *contrà* an Action. 2 *Brant.* 147. d. pl. 378. In Debt. Br. 112. * Action upon the Caſe Br. 5.

this difference is shewed plainly, 21 H. 7. 40. b. pl. 64. 14. H. 7. Debt F. 160. 2 R. 2. Br. contract 40. If a Woman buyeth Goods, and the Husband payeth the Money generally (unless there be an assent wrapt up in that) it doth not charge the Husband, though it be Bread; for by the same Reason, she might build Houses, &c. which is all to his use, yet is a nullity, F.N.B. 120. G. on View of all the Books, 22 H. 6. 20. 13 R. 2. Account, F. 50. Concludes the same. The pinch of this Case is, the Husband allowing no maintenance to the Wife, whereby, if she should not be enabled to contract, the Law hath inevitably determined her ruine, having left her without means otherwise to subsist: But this Reason weighs not; for though she be enabled to take up necessaries, yet the Husband may take them again, for the property is still in him, and he may strip her the next day. And the Law of England hath ordained a more suitable remedy for her, the Ordinary, whose Jurisdiction is proper in these Matrimonial causes, as for Marriage Portion; and its very inconvenient these Domestick things should be ript up before Juries; this meets with the Objection before, for he will not only allow her, but fasten it on her, and to excommunicate him, and imprison his Body, whereby they have the highest Execution of Body and Soul, which was (what ever opinion of the Censures of the Church is now) great in former times, and as much remedy as any Law can give: And this hath been the proper Jurisdiction of an Ordinary, ever since there have been Laws distributed by him that had the plenitude of power in his hand, 8 H. 3. upon a Significavit of the Excommunication, the Sheriff should allow her maintenance, which though now out of date, yet the Excommunicat. Capiendo may be awarded, 2 Cr. 364. and 1 Cr. Drakes Case and Greens Case: A prohibition hath for this cause been awarded to H. Commissioner; and though an Infant may contract for things necessary, yet is there no Case of a Feme Covert suited herewith, but only of a Moin, but Infant meliorari potest Conditionem, contrà of Feme Covert: Lease by her with Rent is void, so of her Feoffment, which cannot be affirmed after his death by acceptance, for she hath no capacity at all, till actuated by him, but is as a Moin, and her Act alone, without his assent, is a nullity; contrà if her Husband joyn with her in Feoffment, &c. 2 Cr. 617. Tracy *against* Dutton, though the Wife made the Lease, and Married but a day before the Rent due, yet was the Lessee forced to pay his Rent again. As to a Monk in Vacation, he is as a Widow, Ecclesia est viduata, and yet every Monk cannot take up Goods in time of Vacation, unless made Abbot

1 Roll 426.

Poph. 38. contra.

So Master may pledge Ship to buy Tackle necessary. Moor 918. pl. 1308.

By 7 Ed. 3. 35. b. pl. 35. by *Stouff.* expresly, that a Moin or Sub-prior in time of Abbee, or in Vacation, may charge him for Money received, if it came *ad usum Domus.*

bot after, or be some Officer in the House, as by custom and usage they were: The Case of Relegation is a civil death, and is an anomilar Case, and the Husband is Quasi non in esse; its true, this Evidence would very well have grounded an Assumpsit, the things being rational to be allowed, but being found specially, this Court cannot determine it so: But this Prohibition determins the point otherwise, 11 H. 6. 30. by Martin, is an Opinion against all the Books without Ground, it is only to be intended where the Husband made the Wife House-Keeper; and there is neither assent, or dissassent express, but immediately followeth the Case of Moin, Cellerer, &c. I confess there are no direct Books in this point, nor are they necessary to be shewed by me in the negative, but by such as affirm the Action doth lye: But Cases semblable are Dy. 364. Poyns Case, where the doubt was not, whither the Goods were necessary or not, but whither the payment to the Taylor would not make an assent; for if it had been specially found he did pay knowingly, it might amount to an Agreement, 5 & 6 Car. 1. Bill *against* Lake C. B. where in Action upon the Case on Assumpsit to pay on request for Goods necessary taken up by the Wife, the Husband pleaded the Statute of Limitations, within which the Request was, but not the Sale of the Goods: And the Question was only, Whether the Sale there was cause of Action by Assumpsit in Law, or not till Request? The Case was compounded, but according to my Reports, the Chief Justice Richardson, and the Court did incline, That no cause of Action did arise on the Contract, but only on the Request, which was necessary to be proved to the Jury, and the six years to be accounted from the Request only; and though an Assumpsit did arise, yet the Husband may prohibit, especially in London, though not every one, as the King may exempt some from Assizes. And that which guides me in this Case, is, the many mischiefs such Cases make in Guildhall, and that it's not prudent for the Woman to be her own Judge in this Case; and she will never be trusted, but upon great advantage of Gain; and it will not be seemly to rip up these differences of Man and Wife before Juries, whereby an everlasting separation and feud is wrought, which would not be by private Examination of the Ordinary; and this is like the seising mens Goods, or levying Debt before the Action brought, which draweth on a violent prosecution, and encourage Women to disobedience and extravagance; and so conclude with the Advice of Ahasuerus against Queen Vasthi, 1 Esther 16, 17, 18 verses.

Hut. 106.

Owen 109. similе.

She may (being *Feme sole* Merchant in *London*) charge him in Account for her Receit. 43 Ed. 3. 32 b. pl. 34.

(2.) Brown ad Idem, 27 H 8. 25. Pl. Com. 13. 17. The Feme having no mind to contract by Word, Writing, or Record, 34 Ed. 3. Brief F. 923. Husband and Wife, and J. S. contract for Clothes, in Action against them, the Wife pleaded she was Covert, and good to abate the Writ. 2. Not by Deed, 1 H. 5. 12. contrà of an Infant: Release of Bond made by Infant and J. S. is good as to Infant, 14 H. 4. 31. contrà as to Feme Covert, 43 Ed. 3. 10. By Record 7 Co. 43. M. 20 Jac. B. R. in Error of Judgment in C. B. Risly granted an Annuity to the Wife of Strafford, and desired to compound for it with the Husband and Wife, and they promised to make such Assurances as R. should think fit; in Action against Baron & Feme for this (however void on Demurrer yet) she being dead, she was only named as Surplusage, and so Judgment was for the Plaintiff: And so Hub. 225. she wants will as Infant doth Judgment, 4 Co. 61. Ognells Case, she cannot assent or licence any act for which reason the Marriage is a countermand of will made by her, 26 H. 6. Attachment F. 4. they shall be distrain'd by his Goods, Forfeiture F. 17. and his Goods can only be forfeited, 2 Cr. 644. But promises to the Wife are good enough, unless the Husband avoids them, 39 Ed. 3. 5. 3 H. 6. 23. 37. 12 R. 2. Brief F. 639. Baron Sole brings Action on Obligation made to them both, 3 Cr. 834. Butler *against* Dell, Brief F. 939. and no other Cases make good promises made to her in trivial things, 2 Cr. 77. 3 Cr. 61.

Action lyeth not in any Case for Money won at play without Specialty.

Trin. 6 Jac. Rot. 1717. Ray *against* Stephens, Action of Trover by the Husband for Money which the Feme had lost at Cards, and Judgment for him; and though she played in his absence, and without assent of her Husband, yet he may have Action for Money won by her: In no Case the Wife cannot charge the Husband, Account Br. 50. is full in this point, Old Nat. Br. 62. in Bill *against* Lake, Hut. 106. it is only videtur Curiæ; so P. 3 Car. 1. Bowel *against* Langham, C. B. The Wife traded in absence of the Husband, as Vintner in London, where by the Custom of London she may trade as Feme sole Merchant, but not as Feme Covert, so 43 Ed. 3. 32. b. pl. 34. 2. The Elopement of the Wife in April, 1646. maketh this stronger, she came before the Action brought; again, the Sale was in 1658. and the Action in 1659. so without the Husbands consent she absented twelve years, contrary to her Vow, for which reason the Husband is not bound to receive her, or allow her Maintenance; contrà if the Husband had put her away, frustrà Legis Auxilium invocat qui in Legem committit. 2 Cr. 502. the Cook of Grays-Inns Case. And though Elopement without Adultery be not punishable, so not Adultery

Adultery without Elopement, for hereby she shall not lose Dower, as Rot 1622. Sir John Stowel *against* Weeks, Mich. 18. Eliz. C. B. Harpers Rep. 47 Ed. 3. 18. An Account against Bayliff, who pleaded that the Lands were allowed to the Wife for Maintenance, and she leased, &c. Account F. 32. Motilams Case, Mich. 14 Jac. C. B. Feme sueth in Spiritual Court for defamation after Divorce, causa Adulterij of the Baron, after which Baron Released, and held void, the cause of Action being after the Divorce. 3. This Prohibition of the Baron makes the Case clear for the Defendant; for if I forbid any person to trust my known Servant, I shall never be charged; so prohibition of one is good enough, though she could charge him, as Condition not to alien to this or that person, and hereby the Tradesman is satisfied she is a Feme Covert, and so cannot be misconusant of his Condition, Dyer 234. This is one Circumstance mainly guiding Sale by the Wife in Market overt, if the Buyer knew it not, as 7 Ed. 4. 14. in Powis Case; contrà of Infant who may be known by inspection, Gipson *against* Capel, Mich. 21 & 22 Eliz. B.R. cited 2 Inst. 713. 10 Co. 43. And I have known many Cases of Suits by the Wife, as of Duncomb, &c. but none this way, 10 Jac. Sir H. Comptons Case, 1 Brownl. 47. per Curiam, the Baron was answerable, but there was no Elopement as here: And in the former times when this Action began, men sued for Legacies, but they cannot do so now. If an Infant be clothed by a Mercer, the Father is not bound for him, and yet the Father is bound to maintain him, 43 Eliz. B.R. 3 Cr. Rippon *against* Norton; but these are voluntary and charitable acts, and not compellable, 39 Eliz. Bachelor *against* Macherell. Bond by Infant for unnecessary Apparel, as with Gold and Silver for a Gentleman of the Earl of Essex, is void. The Baron is only bound to provide for the Feme during Cohabitation, as Pl. Com. 350. and it doth not appear that ever any Necessaries were denied, or demanded of the Husband: And in Drakes Case, the Husband desired Cohabitation, Mich. 10 Jac. C. B. Lady Seymor, Libel in Court Christian against the Baron, That he beat her, and used her hard, that she dare not live with him, F. N. B. 80. and a Prohibition prayed, because she might have the Peace of him at Common Law; but it was denied per Curiam, because the intent and main of the Libel was for Sustenance; and it's no Argument, that because the Jurisdiction of the Spiritual Court is too short, that therefore we should enlarge ours; and the Wife hath brought this Necessity on her self, and its none at all here, for she hath the Cloaths, 3 Cr. 367. William; and the Mercer that trusted hath

March. 44. pl. 69.

Godbolt. 215. pl. 307.

the

the only loss; it will be a greater mischief for us to give a Judgment without foundation, then on the contrary; for by the same reason she may provide Houses, Furniture, &c. & in omnibus agreed with Windham. Ante.

Harris *against* Hawkins. B. R.

(14) Toll. IN Trespass, for taking a Cow, the Defendant Justifieth that the Bishop of D. had a fair by Letters Patents, with Toll, and that the Plaintiff sold certain Hides, and the Defendant demanded 1 d. for Toll, which the Plaintiff denyed, and thereupon he distrained: The Plaintiff replyed that it was Ancient Demean in which he distrained, which is found against him. Jones moved in Arrest of Judgment, that the Justification was ill, for Toll is against Common Right, and here is no Grant nor Prescription layd for distreining. Judgment stayd, per Curiam, had not a Non Pros. been before entend.

Oliver *against* Eams. Ante.

Monday, October 27.

(15) Assumpsit. In Debt Br. 100. Seu 99. Pl.Com.482. That promise was to pay at a day certain, and that the Defendant upon payment should deliver up the Lease and quiet Possession within a week after the day: And by Wild for the Plaintiff, though that Lease be not to be delivered till payment, yet the quiet Possession is to be delivered by the day, which Windham agreed; the Breach being for not delivering Possession, which was to be within a week after the day of payment; but the Plaintiff may keep the Lease till payment, which Twisden and Foster agreed.

Judgment for the Plaintiff.

Mr. Smith.

(11) Officer. THe Oath of the Door-Keeper and chief Cryer, made by patent was, That he should well and truly demean himself, during his being Officer, and that he do no falshood, nor suffer any to be done, but thereof inform the Court, and that he increase no Fees, but that he do in all things well execute his Office, &c.

The

The King *against* Burges, alias Bridges. Ante.

JOnes moved against Restitution upon 31 Eliz. 11. offering a Plea, the Defendant being first put out, after long possession, which the Court granted, and that according to Lambert, the Defendant may indict the Prosecutors for the first force; and by Allen, the proper time to offer a Plea is, when the Prosecutor moveth for Restitution, though in another Term, it being in discretion of the Court. But, by Twisden, Restitution must be granted, but the Court, Ex discretione, may award a Re-restitution, because the Statute extends not to it: Also when a Plea is offered, be it at any time, the Court is foreclosed, and cannot award Execution, which the Court agreed; and that a Plea must be prayed by a peremptory day, and award Restitution, Nisi. (17) Restitution.

Siderf. 88. pl. 4. Whitehood *against* Towel.

IN Action upon the Case for a parcel of Tallow sold by the Plaintiff, laid in Taynton Dean. This by Windham in Arrest of Judgment, is ill, Hub 265. and cannot be intended a Town, because the Dean signifieth the Vale of Taunton, 3 Cr. 732. which as the Wild of Sussex, or in Street, is ill. Curia contrà, this is but the Name, as apud White-Hall, or apud Lincolns-Inn; contrà if it had been from the Deanry of Taunton, or in the Wild of Kent, &c. (contra by Mallet,) but per Curiam, the Defendant might plead nul tiel Vill. So by Wild, in Case of Faukner, Action layd at White-hall, in parochia St. Martini in the Fields, the Visne being taken of St. Martins, was ruled ill, and the Plaintiff could never get Judgment; White-Hall being there intended a Vill: though Twisden conceived the Reason of stay of that Judgment there to be because the Parish of St. Martin was omitted; and in the Case at Bar, though the Judges know it to contein divers Vills, yet they must know it Judicially: So by Windham, Obligation made at Burdeaux in France, is good, and all shall be intended Vill; So in Lydeard, Bishop is good, contrà in the Bishoprick of L. So in Easom Vale is good, contrà in the Vale of Easom, or of Forest, 47 Ed. 3. (18) Visne.

Judgment for the Plaintiff, Nisi.

Hole

Hole Executor of Hasket *against* Bradford.

(19) Executors. Sidert. 88. pl. 50.

IN an Action of Debt on 12 Car. 2. c. 17. §. 8. for Fifths, Stroud moved in Arrest of Judgment, That the Action being given against the Incumbent in Possession, lyeth not (as brought) against the Executors of such person that ought to pay it, as it doth by the Executor of the person. Windham, This is an Action grounded on a Duty, and so is Chapman *against* Dalton, Pl. Com. 286. b. the Executors are chargeable; contrà where the Statute giveth remedy for Collateral matter, which the Court agréed: And by Twisden, where the Contract oritur ex delicto, as for not setting out of Tythes, Action lyeth not against Executor of Parishoner; nor doth Trover lye against Executor for Conversion by Testator by Statute; but contrà where it ariseth ex quasi Contractu, as Sir Edward Mittons Case, and as in this Case at Bar, which is a remedial Law, and the Executor is at no Prejudice. Post. Adjornatur.

The Action of Account was founded on duty, yet by W. 2. cap. 23. nor 4 Ed. 3. 7. extended not to Executor of Executors, till 25 Ed. 3. cap. 5.

Crawford *against* Middleton.

(20) Slander. *Contrà* of such words spoken by Attorny to Client, Moor 178. pl. 334.

THe Defendant said he was going to London; and a Gentleman met him, and said, I perceive you are going to London with a Prisoner, and I will follow with another, namely the Plaintiff, Son of J. S. for stealing of a Mare from Norfolk Coasts; which the Court conceived actionable, as well as for false news. Bigland moved in Arrest of Judgment: But Megs *against* Griffith, 3 Cr. 400. is express without any Averment of Felony committed. Adjornatur.

Holt *against* Harder.

(21) Estopple.

REcital in Bond is an Estoppel to say the contrary; but if Issue be tried contrary, its good; as Non damnificat. pleaded in Debt on Bond with Condition to pay for Meat, Drink, &c. And the Plaintiff replyed quod Hospitavit; on which the Defendant takes Issue quod non Hospitavit, and ruled good after Verdict.

Crawford

Crawford *against* Dawſon.

MArſhall moved in Arreſt of Judgment in Action upon the Caſe quod Crimen Feloniæ impoſuit, on M. 2 Car. King *against* Menick, Latch. 179. but per Curiam, it's a common Caſe in 1 Cr. 276. pl. 331. Smith *against* Hutchinſon, &c. 2. It was alſo for cauſing him to be impriſoned for three days, which per Curiam, is a conſequent Damage purſuant to the former. Judgment for the Plaintiff. So quod Crimen ſuſpicionis Feloniæ impoſuit. (22) Slander.

Noble *against* Newark Corporation.

TUrner moved in Arreſt of Judgment on a Cognovit Actionem at the Aſſizes, in Ejectment on a Demiſe of Corporation, not ſaying by Deed, 14 H. 7. 17. Mich. 1661. in Exchequer, Fenwicks Caſe, Judgment arreſted for this Cauſe, Curia contrà; they need not ſay per Indent. or Scriptum, but it ſhall be intended after this, as well as after Verdict. (23) Corporation.

Adjornatur.

IN action on 5 Eliz. 4. for 40 s. forfeiture, for exerciſing Trade. Wingfield moved, after Verdict, that the Trial ought to have been at B. where the Cauſe of Action was, which is Corporation, having Cogniſance of ſuch Cauſes by 21 Jac. 4. but per Curiam, the Act being layd at B. in Comitatu L. the Corporation ſhould have pleaded at the Trial, but now it is too late. (24) Trades. Moor 421. pl. 581. 2 Cr. 219. pl. 17.

Buxton *against* Bateman in Chattels Br. 11.

Tueſday, October 28.

ON 8 H. 7. 12. 3 Inſt. 202. 2 Cr. 366. 604. Hub. 69. Poph. 140. In Action upon the Caſe for a Pue in a Church, which the Plaintiff claimed by Preſcription. Allen moved in Arreſt of Judgment, that no ground is laid for the Preſcription, as that Plaintiff did repair, &c. and the difference is where one grounds his Title on Grant of the Ordinary, or by Cuſtom, which after Verdict ſhall be intended good; contrà of ſuch ſpecial Preſcription as this, which Windham agreed, if the Pue be in the Body of the Church; but contrary where it is in an Iſle which may appertain to a Houſe; and the Preſcription was to have a Seat in quadam Cella, which per (25) Church. Siderf. 88. pl. 6.

Curiam, is an Isle, 1 Inst. 121. b. and doubted whether any ground is necessary. Post. Adjornatur.

Ante.

(26) Visne. ACtion upon the Case on Rescous is out of the Common Rules of the Court to alter the Venue, but it's in the discretion of the Court, Lady Leicester *against* Sanford, upon Consideration of the Circumstances to alter it, as upon an Action brought against Bankrupt may be laid in the County, or here whence the Commission is awarded; and the Court changed it into an indifferent adjoyning County, which not appearing, Verdict for the Defendant.

Herbert *against* Paget. Ante.

(27) Amendment. ON 4 Car. 1. Savills Case in C. B. the Attorney before a Recordatur entred, may enter his own Errors for the Defendant in Action upon the Case, for negligent keeping Records, wherein, per Curiam, having uncontroulable liberty of coming into the Treasury, there must be some special negligence appear: And thereupon the Plaintiff was Nonsuited.

Talwich *against* Osborn.

(28) Record. IN London the Court may force the Attorneys to bring in the Postea; contrà in the Country: But in both Cases, notice of it, with the Number Roll, must be given to the other Attorney when it cometh into Court.

Siderf. 89. pl. 7. Scot *against* Sephenson.

(29) Assumpsit. 1 Leonard. 173. pl. 241. IN Action upon the Case upon Promise if Plaintiff would forbear to sue him, being Administrator of J. S. for whom the Plaintiff was Security, the Defendant would pay, &c. Weston in Arrest of Judgment on Yelvert. 40. Bosden *against* Thins Case, that this is no cause of Action, the Intestate being not bound, the Administrator is not, Owen 133. Smith *against* Jones in Debt Br. 79. the Cases the Court agreed for Law: But by Windham, the Testator being a Surety, its a sufficient Consideration; and by Twisden, being Co-obligor, there might be cause of Action against him, and the particulars need not be shewed, My Lord St. Pauls Case, Rivers Case, the Heir promised on Forbearance to pay Bond made by the Testator,

Yelvert. 16. pl. 26.

ſtatoꝛ, wherein it appeared not the Heir was bound, yet (which per Curiam was hard) Judgment was againſt the Heir, Jordan *againſt* Clerke, and Roſier *againſt* Langdale, Stiles 248. pl. 566. Promiſe made by the Wife in conſideration of forbearance againſt her, to pay Debt of her Husband, is void; contrà if that the promiſe be foꝛ general Foꝛbearance, foꝛ that is againſt all perſons; and though there be no cauſe of Action, yet there is ſufficient remedy in Chancery, of which our Law will take notice. Alſo here it doth appear the Plaintiff had payed the Debt, which per Curiam, is good cauſe of Suit.

Adjornatur.

Farre *againſt* Alexander.

Wedneſday, October 29.

(30) Audit. Querela. 28 Ed. 3. 99. pl. 31.

IN Audita Querela, H. ſhall not be baild upon a Verbal Affirmation, without a Deed of Releaſe generally, but here the Money was levied in Execution, and Releaſe made to the Baily, which was confeſt by the Defendant; but the Audita Querela was not grounded thereon, but upon the ſatisfaction, of which, By Windham, this is a ſufficient Evidence foꝛ the Plaintiff, which is the Subſtance required, F. N. B. which the Court agreed; but oꝛdered that the Audita Querela ſhould mention that the Defendant per factum ſuum of Releaſe did acknowledge himſelf ſatisfied, and that it be new ſeal'd, that ſo the Audita Querela may be grounded on the Deed.

Adjornatur.

Harris *againſt* Beſſie.

(31) Noſme.

IN Debt on Obligation, Condition to make a Will in the preſence of ſuch perſons as he ſhould appoint. The Defendant pleaded that he made the Will in preſence of W. O. ſuch as he did appoint, videlicet, in the preſence of Graciæ, ſo the Iſſue Roll, but the Niſi prius Roll was Grac. And at the Trial the Will was proved made in the preſence of Gracius, which being another perſon, the Defendant moved to have a new Trial, pretending ſurpriſe, on Hut. 120. Hicks and Monke, &c. Hub. 73. Pope *againſt* Skinner. By Twiſden it's ſufficient if the Will be made in the preſence of any, though other perſons then alledged; contrà if it were to be made in the preſence of A. and B. particularly, the Iſſue was, that no ſuch Will was made in the preſence of ſuch perſons as the Plaintiff ſhould appoint. And by Jones foꝛ the Defendant, he could

not say he made the Will in the presence of A. and B. but must say that he made it in the presence of such persons, namely A. and B. which is but an ascertaining the persons for the Defendants notice of Trial: But per Curiam, this is well enough, and is but the same name; though by Windham, on a Justification, such particular days, or things, or persons are traversable. 2. Stroud moved in Arrest of Judgment, that Authority was given to the Wife to Devise 300 l. and she disposeth 200 by Fifties, and well per Curiam, but on Licence to Attorney to Lease for 21 years in my name, he cannot make it for more or less, contrà on such power reserved, &c. 3. By Jones, The Condition is that she shall make it in the presence of the Husband, unless he refuse, or in presence of J. S. or two such persons as she should appoint, which is insufficient, no refusal being alledged, or notice to the Husband, which by Windham, ought to be, Dy. Leeks Case, Curia contrà, it being in the Wives Election, and a new Trial was refused.

See Moor 35. pl. 116. Leases are Intire, &c.

Hall *against* Creswell and his Wife.

(32) Baron & Feme.

IN Debt on Obligation against Baron & Feme, being made by her in Widuity, with Condition that she, her Heirs and Assigns, kéep Contracts and Covenants made betwixt former Husband and his Lessée the Plaintiff. The Defendant said there were no Covenants made betwixt them. The Plaintiff saith there was an Agréement that the Plaintiff should enjoy a Warren of the Demise of the former Husband, and that he entred till put out by the Defendant; Issue on no such Agréement found for the Plaintiff. Jones moved in Arrest of Judgment, that there was no Estate alledged in the former Husband in right of the Wife, whereby, though the second Husband be Assignee in Law, yet he enters of his own wrong, and not as claiming under her: But by Allen for the Plaintiff, its not requisite that he Husband be Assignee of the Estate, but her Assignee of Contract, which she might have avoided; which Windham agreed: Twisden contrà, that the Husband must be some ways intitled to the Lease, it being not necessary that any Contract, real or personal, relating to the Wife, be intended; but may be as that she or her Assigns would not beat J. S. in which case Husband is no Assignee. Foster agréed with Windham, and that she is bound for some intended interest, though no certain Estate appear, which the Husband hath by Marriage, and doth act in her right.

Adjornatur.

Hursts

Hurſts Caſe, Ante.

THe Court refuſed to grant a Mandamus to reſtore Attorney of Corporation of Canterbury, though a Franchiſe for life, being only private; ſo of Solicitor, contrà of Town-Clerk. (33) Attorny. Sidert. 94. pl. 19.

Wheatly *againſt* Thomas.

Thurſday, Octob. 30.

BY Special Verdict it appeared that the Lord Cobham ſeiſed, 3 Ph. & Mar. deviſed to his eldeſt Son William for Life, Remainder to the firſt, ſecond, and tenth Son in Tail, and ſo to divers Iſſues Males, and ſo to eight of his Sons; and in default of ſuch Iſſue, the Remainder in tail to the Heirs generally of the Body of William, the Remainder in Fee to Edward the youngeſt Son; Edward and the reſt dyed without Iſſue, whereby the Eſtate by death of the reſt deſcended unto William the eldeſt, who had Iſſue George, who had Iſſue William, who had Iſſue Duke, George, and Charles, (and alſo three Daughters) G. was attainted and executed 1 Jac. after which 3 Jac. the Lord Henry Cobham alſo was attainted by Parliament, and after the King Grants to Duke Brooke by Letters Patents, whereby the Lands were limited to Duke and his Heirs ſo long as any Iſſue Male of William were living, prout by the Will. The Iſſue of William is the Leſſor of the Plaintiff, claiming by the Will for want of Heirs Males of the reſt, and Henry was living when Duke had Iſſue, under whoſe Conveyance by Fine and Recovery the Defendant claims. Baldwin for the Plaintiff, That Henry was Tenant in Tail in Poſſeſſion, and had a Remainder of the Fee veſted in him by death of Edward, and both Titles veſted in the King, but by the Act of 3 Jac. of Reſtitution the Daughters, as Heirs by that Will in Tayl have good Title, now as 9 Co. 30. Abbot of Strata Marcellas Caſe, when Charter doth refer to another, its all one as if they were particularly recited, Patents Br. 31 and 91. So alſo the ſame Relative words are of the ſame force in Acts of Parliament, Pl. Com. 930. Binkly *againſt* Thomas, and therefore it being found that the Lands in queſtion were deviſed in Tail to the Iſſues of William, and that the Leſſor of the Plaintiff is ſo, he hath good Title. And whereas it is objected that this Reference is inſenſible, being that the Lands ſhall be and remain (34) Remainder. Apres. 249. pl. 318.

to

to the Issue according to the Will, which yet is sufficient to shew the intent of the Act of Parliament, that the Plaintiff shall have them, and (shall be and remain,) shall refer to the Estate, and the words (shall be held and enjoyned) shall be referred to the Will, and so all may stand. But the main Objection is, that Henry being Attainted and alive, the Heirs of William cannot take: Answer, By the Act of Restitution there are five Estates Tail to be spent before the Will is to take effect, it being in default of such Issue, &c. and by the Will there is no particular Estate limited to Henry, but its sufficient if there be an Heir to take when the particular Estate determins, 1 Co. 63. Dy. Cranmers Case: and so though in strictness William had no Issue, yet Henry dying before all the Estates were spent, the Attainder being now by the Act of 7 Jac. purged, they may devise, and as Heir have Formedon, had William discontinued. 2. The intent of 3 Jac. was, that so long as the Lord C. had Issue, the Reversion should not come to the Crown, (he having a numerous Progeny, and was the first that thus setled on the first, second and tenth Son) the Lands in Question being an Allowance for their Maintenance; and there cannot be no other signification of this Limitation, then that after the Remainders to the Sons (which were provided not to be discontinued by Fine or Recovery) the Daughters should take, which had been frivolous, unless there were Estates Tail to be cut off. 3. The Parliament are not tyed to the strict Rules of Common Conveyances, 18 Ass. 5. The Princes Case being Confirmed by Parliament. Also this Act of Parliament is quasi a Restitution, which shall be taken most favourably for the party against the King, as 3 Inst. 241. the nearest Case to this is, Mich. 8. Ed. 1. Rot. 62. in the Tally Office; though William had no Heirs when Henry was attainted, yet because the Blood may be restored, a Limitation to them may be good; if the Limitation had been generally according to the Will, it might be doubtful whither the Heirs of William should take; but contrà here where the Act particularly limits it to the Heirs of William according to the Will; and so is like Estate given to H. for life, Remainder to the Heirs of the person Attainted, is good, if the person be restored before death of Tenant for Life; and there was no other intent of the Act of 7 Jac. then to put the Attainder out of the way; also the Estate hath been enjoyd according to the Act of 3 Jac. to this day. Jones for the Defendant, The Act of 7 Jac. can have no operation in this Case, there being an express proviso, that as to the Lands in Question, it shall be of no force. 2. Henry at the time of attainder had two Estates

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in Tayl in poſſeſſion, and the Reverſion that was to Williams and the Heirs Males, &c. And by the Act of Parliament, this Remainder cannot be veſted again in Henry, nor William: He agreed the Confirmation of Acts, as Baldwin alledged, and that this is as ſtrong as expreſs, but yet at the time of the Act, Henry was not Heir of William, and ſo cannot take by diſcent, nor by purchaſe, he cannot without entitling himſelf as Heir compleatly, Hub. 31. Counden *againſt* Clerk, contrà by diſcent; and as in Conveyances ſo by way of Will, Foſter *againſt* Ramſey, B. R. Plaintiff deviſed to the Heir of his Brother, (which was an Alien) and adjudged he could not take, and he denyed the Caſe that Reverſion to the Heirs of the perſon attainted is good, becauſe no ſuch forreign poſſibility ſhall be preſumed as Reſtitution. And here it is not the intent of the Act to make any contingent Remainder, and the Act never intended to make any Iſſue of Henry, the Heir of the Body of William, Capable, elſe ſhould it reſtore him and George his Brother under general words; alſo this is the Act that confirms the Attainder; the Act did intend only to ſuch Remainders as were capable, not to enable any, as if any in the mean Remainder had levyed a Fine, this Act would not defeat it, but ſettle it ſo upon the perſons, as if there were no Act by them to deprive themſelves: Likewiſe ſhould the Act give any Eſtate to them, it ſhould be to the uſe of the King, who is not bound without expreſs words. Twiſden, the only ſtreſs is on the intent of the Act, which, by Windham, is not to Eſtabliſh the Eſtate as againſt Fine, but againſt Forfeiture, and hath given it in expreſs words to Duke and his Heirs, ſo long as William the Grandfather hath Heirs Males of his Body, according to the Will, whereby its doubtful whether it may carry the Lands to the Heirs General through all the other diſabled perſons; Had William had Iſſue Male ſuch Iſſue ſhould inherit. Adjornatur.

Pl. Com. 557. b. 27. b. 8 Inſt. 391. b.

Win *againſt* Lloyd. Ante.

NOw upon a ſecond Scire Facias ſeveral Tenants come in, and one pleads he hath only for years; and another not Summoned hath the Reverſion; and another in Abatement, that the Plaintiff entred into the Land pendant the Writ of Error, which, by Allen, is ill, the Writ being but ex gratia, and the Return of the Sheriff is concluſive; and 31 H. 6. it hath been doubted whither he may plead in nullo eſt erratum, a fortiori, not in abatement: And if the Pleas ſhould be falſe, the Plaintiff cannot thereby have Judgment Reverſt, but is in Statu

(35) Scire Facias. Moor 524. pl. 693.

Statu quo: And should the Judgment be reverst without them, its good. Williams for the Defendants, Tertenants conceive that the Pleas are good; and that Tertenants may plead for themselves is the constant course, the entry on the Roll on Scire Facias being to hear the Process, Record, and Errors; and so it would be in vain, Dy. 321. should they not have liberty to plead to all of them, Holland *against* Dancy 3 Cr. 739. The like Plea, as here, that there were other Tertenants (not named) Joyntenants, Charnock *against* Worsly 3 Cr. 129. Bartholmew *against* Belfield, 2 Cr. 332. and that the Pleas particularly are good. 1. That entry into the Land pendant the Writ of Error, doth abate it, the nature of the Writ being a right of Action in order to Recovery of Land, which cannot be (as the Ground of Remitter is) because he is in possession. 2. Return of this Writ is to remove prejudice, which one in possession cannot have, be it rightful, or by wrong and the prejudice must be immediate, and not consequential, which is the reason Bayl cannot Revers Judgment against the principal. 2. The end of this Writ is to give possession, which he hath already by voluntary Action; contrà if by Act in Law the possession be cast on him. Lloyd *against* Bethells Case 11 Jac. in Assize in the Great Sessions in Wales, the Writ abated by entry, and making Lease, Bridgman Knight *against* Mayor of Wickam, 3 Cr. 484. Lease for years made or accepted, suspends the bringing Error, Feoffment destroys it. 12 H. 6. 6. As to the second Plea, that the Tertenant is but Lessee for years, and J. O. seised of the Freehold, is good, and no more then Prayer in Ayd, Champernoons Case, 2 Cr. 392. Owen 157. 3 Cr. 471. And here the entry on the Roll is, that the Court will not proceed to Examine Errors, till all Tertenants come in, be it in necessity or in discretion to award Scire Facias before or after Reversal, yet being awarded, it must be fully determined. Allen for the Plaintiff agreed the Cases, but the Plea in Hancocks Case of Joyntenancy, is not in abatement, but in Bar for a Moiety; and that an Entry will abate a Writ of Error, he denyed; for though one hath possession, it may be charged, which cannot be avoided till Error brought; and the Case of Lloyd *against* Bethell, was betwixt the parties, not by any Tertenant, as here. Twisden the Tertenants (as in Samsons Case) have nothing to do with the Errors, but only with the Process and Record. Windham, Where the party enters and makes a Lease, that goeth properly to the Tenancy, and suspends the Action, but this Entry is only in abatement, and its every days practice to bring Error, though one be in possession; but he doubted

ed of the Plea, that he was but Leſſee, becauſe a Special Nontenure, but Holland *againſt* Jackſon, Bridgman; per Curiam, if one Tertenant be warned, and returned by the Sheriff, the Court will never award another Scire Facias on Suggeſtion that there are more, but the Plaintiff for Expedition had taken out this Scire facias; but here the Court doubted of the Plea of Leſſee for years. Adjornatur.

NOta per Curiam, the courſe of the Court is, that one that cometh in to be made Defendant in Ejectment, upon his Prayer confeſſing Leaſe, Entry, &c. ſhall not be charged with any Actions by the Bye, becauſe he cometh in without Proces or Arreſt, only to Defend the Tytle. (36) Privilege.

Mahew *againſt* Flower. Siderf. 98. pl. 28.

WAllop moved in Arreſt of Judgment in Trover de una Stanna plauca, Angl. a Plank Bench, which he conceived ill. Adjornatur. (37) Trover.

Crawford *againſt* Middleton. Ante.

PElham moved for Judgment; that Steward *againſt* Butler Hub. 177. is not like this, but 2 Cr. 154. is, for though he be not expreſly charged with any felony, yet it is a Defamation; 2 Cr. 347. 536. but by Bigland for the Defendant, here the words are Doubtful, and therefore muſt be expreſly averd there was a Felony, Hub. 305. 2. It is not ſaid, ubi revera, he never ſpake ſuch words. Pelham for the Plaintiff, if the perſon had been named, he muſt ſay ubi revera; contrà where no perſon is named, for then he cannot Juſtifie, 12 Co. 134. but by Windham, Megs *againſt* Griffins Caſe is as this Caſe of General Report; An averment is neceſſary, Lewis *againſt* Walter and Lady Moriſons Caſe, contrà where one ſaid he Dreamt A. was in Goal, there needs no averment, ubi revera. Adjornatur. (38) Slander.

Friday, October 31.

(39) Tythes. IN Suit in Spiritual Court of the Arch-D. of Berkshire for Tyths; The Defendant Suggesting they belong to another Will, Prayed a Prohibition, which Windham denyed, by reason the Bonds are but incident, and they have Cognizance of the Principal; so Foster, contrà by Twisden; but the Prohibition was granted, Nisi.

Hughs *against* Hughs.

(40) Wales. WIlliams moved against a Prohibition awarded by Court of Common Law in Grand Sessions of Wales, in the old Counties, to an Ecclesiastical Court there, for examining Marriage after death of the party, which he conceived they could not; Twisden contrà, though they cannot hold Plea of Quare Impedit, yet they may award Prohibition, as well as these Supream Courts, though Athows Case, these only grant Mandamus's and Habeas Corpus's unto all, which the Court agreed. Adjornatur.

Hursts Case. Ante.

(41) Mandamus. THe Court refused to grant Mandamus, being without Precedent, the lowest whereof is a Schoolmaster, it was denyed to Office of Waterworks in London, so to Steward of Court Baron; contrà of Leet; and the Attornies of C. B. are sworn, yet no Mandamus ever awarded, nor can it be for any Office that hath not some interest on publick Government.

Southcot *against* Ryder.

(42) Account. Hetly 116. seu 114. Arbitrement is Bar not in discharge of Account. IN Action of Account, the Defendant pleaded specially that the Bony was delivered by the Plaintiff to deliver to such persons as A. B. and C. Commissioners should appoint, which was before the Act of Oblivion publisht, and Judgment being against him quod computet: The Defendant afterward before Auditors sheweth, that the Bony was ordered by the said A.B.C. &c. Commissioners to be disposed to publick use, and so plead Act of Oblivion, to which the Plaintiff demurred, as a repugnant Plea, and might be pleaded in Bar, and therefore cannot be pleaded in discharge now; but on the General Issue pleaded by the Act of Oblivion, the Defendant might have shewed this in Evidence. Polixphen for the Defendant, conceived

ceived this may be pleaded in discharge, being an excuse of payment which is as well pleadable in discharge as payment, 41 Ed. 3. 31. some things may be pleaded, as well in Bar, as in discharge, 4 Ed. 4. 15. Account Br. 43. 22 H. 6. 55. Account Br. 48. as an Accord, Latch. 59. but this Plea of the Defendant could not be pleaded in Bar, there being a person appointed by the Act of Oblivion specially to receive it, Rast. Entries 15. 11. Co. 38. 19 H. 6. 5. and there is no difference whether the Act were before or after the Receit; And this is the properest Construction of the Act, whereby disbursments may be shewed; which cannot be in Bar, Rast. Entries, one may plead unque Receivor, and yet plead in discharge before Auditors; If they had pleaded the General Issue, they might have given it in Evidence, but its in the Defendants Election to use it one way or other; and this Plea is not like a Replication to the Bar, nor need be so pursuant, which Windham agreed. Twisden, upon Bailment of Money to J. S. to Bayl over J. S. must plead Baylment in Bar, and not before Auditors; contrà when Baylor of Mony to rebail, command Baylée to pay to A. also because the Act is made before he pleaded, and so must be pleaded in Bar, Cheeke *against* Bayton, as an Acquittance of the payment, and Release of the Action, and it is not averd that the Defendant paid the Money over to J. S. but the Account being betwixt April and August, and he pleaded payment August before.

Releasc or payment of part is only pleadable in discharge 3 Ed. 3 5. pl 13. Account F. 105.

The time is necessary in this Action 6 Ed. 3. 40. pl. 18. and the day traversable 25 Ed. 3. 46. Eliz. 10. b. pl. 33.

Anjornatur.

Molins *against* Welden.

ERror of a Judgment in Marshalsey, in Action of Debt on Bond, & mutuatus was assigned in that the Court is said to be holden before J. O. and Owen Win, &c. ubi revera, it was not holden before them; which by Jones, is well enough, being in inferiour Court, though against the Record, being confest by Demurrer, and the Certiorari being that the Court was holden before them by Patent, the Writ of Error being only directed Judicibus generally. Twisden an Action upon the Case will clearly lye against such person, Steward or Attorny, that drew up the Record, but it cannot be assigned for Error, which the Court agreed; and the Demurrer confesseth only what is well pleaded. Adjornatur.

(43) Estople.

Vernon *against* Alsop.

(44) Obligation. Br. 42. Arbitrement Br. 29. So 20 Ed. 4. 8. b. pl. 2. but it cannot be pleaded but an Action of Covenant on Suit.

IN Debt on Obligation on Condition to pay Mony, and in Default thereof, that the Bond shall be void, the Defendant pleaded he did not pay, and the Plaintiff demurred notwithstanding 39 H. 6. 10. by Littleton in Obligation, 3 Cr. 780. Weekly *against* Blackworth, the parts of the Condition being inconsistent, and so the Latter void, or else both are void, and so the Bond single, which Windham and Foster agreed; contrà by Twisden. 2. The Defendant pleaded, that at one day on which the Money should have been paid, he made default, which by Paulet for the Plaintiff, is ill, and should have been that nothing ought to be paid at such a day.

Adjornatur.

Hole *against* Bradford. Ante.

Monday, November 3.

(45) Executors.

JOnes for the Defendant, that no Action lyeth, because the precedent Clause of the Act speaks only of Ecclesiastick Persons (and no duty was due to the Plaintiff during the Defendants Testators life) therefore it shall not be extended in the remedy beyond it. Windham, the Action of Escape is founded ex delicto, and so Executors are not lyable; but this is founded on a duty, and if an Act of Parliament should give a Remedy against Executors for a Legacy at Common Law, no doubt but Executor of Executors, or other person interessed, would be charged. Twisden, many Executors not named are chargeable and Relievable: And by Foster, this is a mischief this Statute intended to remedy, though it be not within the words; also an Indebitatus Assumpsit would then lye upon receipt of my Rents as a Debt, Rolls *against* Copher, à Fortiori in this Case per Curiam.

Judgment for the Plaintiff.

Baker *against* Berisford.

(46) Copyhold. Entre Congeable. Br. 139. And 44 Ed. 3. 31. b. pl. 12. is expres she shall.

IN Action of Covenant upon Lease by Copyholder, whose Feme by Custom is to have Moiety as Survivor, and if any Lease be made, then she should have a Moiety of the Rent, after the Feme of A was seised of Moiety, the Heir of A. dying. By Jones, in Arrest of Judgment, his Feme shall not have a Moiety of his Moiety, which the Court denyed

ed, beſide Mallet; And by Windham, if a Heriot be payable for the whole, if it be part ſurrendred, both ſhall pay Heriots, ſo no inconvenience; and by Cuſtom the Wife may have the whole; ſo of the Cuſtom of Gavelkind. 2. An aſſignée of Copyholder is not within the Statute to have Action of Covenant, Curia contrà: Judgment Niſi.

Dub tatur 1 Cr. 24 pl. 28. 2 Cr. 305. pl. 7. 1 Cr. 44. pl. 51. are that ſuch Aſſignee cannot enter for condition broken. But againſt Ordinary he muſt by 25 Ed. 3. c. 9. Poult. 151. Co. Entries is particular, fol. 337. b. ſo is Co. Entr. 365. b. §. 4.

King *againſt* Gover. Siderf. 91. pl. 13.

INdictment of Extortion quod colore officij extorſive injurioſe he took Money, and ſheweth not for what matter or cauſe, which per Curiam, is well enough, the Officer being Bayliff of a Hundred, and he needed not ſhew particular cauſe, eſpecially being after verdict. Judgment for the Plaintiff. Niſi. (47)

Le-ſtrange *againſt* Temple. Siderf. 90. pl. 9.

Tueſday, November 4.

IN Evidence to Jury, Maynard for the Defendant, challenged the Tales, being not returned by the Sheriff, his deputy, or any ſworn Officer, but being by Clerk of the Court, by general appointment of the Sheriff, to act his buſineſs in his abſence, per Curiam, its well enough, and the Sheriff is anſwerable for it. 2. Tenant in Common deviſeth, and after by Agreement and Fine (without Writ according to Statute) makes partition, which per Curiam, in C. B. as now in B. R. is a Revocation; (However, after ſo long time as here, 80 years, a new publication ſhall be preſumed) 3. Tenant for life Bargains and Sels all his Eſtate, and then upon Recovery ſuffered againſt Barganee, he cometh in as Mouchee, whereby, by Windham, Tenant for Life is made Tenant to the Præcipe, ſo it is a forfeiture, all being but one Conveyance, which the Court agreed. 4. By Glyn, Remainder limited on marriage ſettlement to the Daughters, veſts in them as they are born, and the Poſtnati Break in on them; contrà here upon Limitation to all the Daughters: But, by Twiſden, its all one, which the Court agreed: But, by Sir Jeoffry Palmer for the Plaintiff, the Law abhors removal of Inheritances, and had the Limitation been to all the Daughters living at the time of the Anceſtors death, it had been a good Contingent; and this is the like Caſe, and hath never yet received Determination. 5. Father and Son, he being Tenant for Life, the Remainder to the Son for Life, joyn (48) Forfeiture. So on Feoffment to uſe of deviſor in Fee 1 Cr. 24. pl. 27. And this Recovery without voucher is a forfeiture in both as Moor 271. pl. 423. ſo Leond 264. pl. 354. is, that fine levyed by Tenant for Life to Bargainee is a forfeiture only in the Bargainee but if Leſſee for years accept grant for Life to be made only Tenant to the Precipe in Recovery or fine to the uſe of J. S. Its no Extinguiſhment. 2 Cr. 643. pl. 3.

joyn in a voluntary settlement, if it were with any Intent in the Father, or both, to defeat any other purchaser, then it will be fraudulent, as Burrels Case, else not any concluding Evidence: But if the party that made it had sold, fraud would be presumed, contrà here; though Wingfield *against* Brisford, there be a power of Revocation if it be determined; contrà if it be only Releast, which the Court agreed: Yet every voluntary conveyance is not fraudulent, unless the intent appear on Circumstances. 6. The Proviso was, that if the Auncestor, by his proper handwriting to be written or endorsed on the Indenture, should revoke the uses therein, which by Maynard for the Defendant, ought to be by writing on the Indenture, which the Court denyed; and that the Revocation may be by other writings, as well as Indorcement. 7. That Recovery suffered by Tenant for Life after Bargain and Sale, is a forfeiture, 16 Ass. 16. Fines F. and entry being made, shall not be purged by reversing it, for want of an Original. As to the Reversion, Maynard conceived here can be no Cross Remainder, which cannot be but betwixt two persons only, as was resolved, Gilbert *against* Writhes Case in Dodridges time expressly, and not where there are more, as might have been here. Verdict for the Plaintiff for third part, that no fraud appears.

Hayes Case.

Wednesday, November 5.

(49) Common. KEeling prayed Distringas upon Writ out of this Court, to distrain the next adjoyning Vils on a Writ out of the Chancery on Westm. 2. cap. 46. to enquire of Breaking Hedges, returned per quosdam ignotos, and granted per Curiam; the same was granted for the Queen *against* Vills adjoyning to Somersam.

Hill *against* Snow.

(50) Usury. BAldwin moved in Arrest of Judgment in Debt on corrupt agreement, that J.S. on 21 l. Money lent, should pay to such persons as the Plaintiff should name 30 l. at the end of six Months, if the Ship returned, or did not go forth (as indeed it did not) and that the Def. for Brokage should have a certain Sum, the Defendant to bear the hazard of the Sea, which he conceived not usury; but per Curiam, the Jury have found this usury, and the Court will now presume it. 2. That the Action

on is brought against the Broker, whereas by 12 Car. 2. cap. the Action is to be brought against the party who lent, which was J. S. to whom the Bond was made. Also by Wingfield for the Defendant, its not like Burtons Case, but the Hazard goeth to the Principal, and is a probable one, as 2 Cr. 507. Roberts *against* Tremain. The Court agreed Bills of Bottomree good; but contrà in this Case, where the possibility is remote, and the Money lent by Snow. Post. 359. pl. 54.

Brook *against* Sharpe.

SCrogs prayed an Amendment of Release pleaded, made 1 March for 29 February, which by Allen for the Plaintiff, its needless as its pleaded, that such a day be releast, whereon he may give Evidence at any day before or after; contra where H. pleaded, that by Release bearing date 1 March, that is precise to the day; and though the Record were made up, the Court awarded an Amendment in Debt on a Bond. (51) Amendment.

Brown *against* Charlton.

B. thou Rogue, wilt thou Murder my Sister as thou didst thy Wife, (Innuendo A then defunct:) adjudged Actionable per Curiam, for the greater Scandal if she be not dead; and being ficta & falsa, they shall be intended Scandalosa. (52) Slander.

Moor *against* Plowman. In Error Br. 137.

Thursday, November 6.

ERror of a Judgment in Ejectment by Original in B. R. Retornable 12 February at the next Session of Parliament. Wild notwithstanding prayed Execution, the Parliament being prorogued, which the Court granted, and Superseded the Writ, and will take no notice that it is in Esse; contra on Adjournment. (53) Error.

Hill *against* Snowe. Ante. 358. pl. 50.

SNow and M. agreed that S. should lend, and M. should be bound to such person as S. should name, and that such person should bear the peril of the Sea: Also in the same Action is another Count against the Defendant, as a Solicitor and Procurer of H. and if either of these Causes of Action fail, its against the Plaintiff for the whole. Jones for the Plaintiff, that (54) Usury.

that its well enough, and no hazard appears, being to be paid at Return of a Ship tunc in servitio Domini Regis, which the Court cannot adjudge of, but its in the Jury; for the Ship might be within a mile of Harbor. Twisden, Had this matter been found specially, it had been no Usury; contra on general Verdict as here, which the Court agreed. 2. As to the Brokage its well enough, the Defendant lending his own Money, per Curiam, though another name be used. 3. One Action cannot be grounded on several Statutes, where several penalties are given against several persons; contra upon several offences in the same Statute. Judgment for the Plaintiff.

Oldham *against* Hemstead.

(55) Replevin. Pl.Com. 564.b. It were sufficient if Plaintiff had possession though the goods were but Bayld against any but him that hath property 2 Ed. 3. 17. pl. 19. Avowant may say he hath property 9 Ed. 3. 14. pl. 19. or that property is in J. S. *absque hoc* that it is in Avowant may be pleaded by Plaintiff in Replevin 29 Ed. 3. 92. b. seu 3. b. pl. 14.

1 Lev. 90

IN Replevin of taking Shoos in the Shop the Defendant, who Avows as Bayly of J.S. and that the property was in him absque hoc, that it was in the Plaintiff. Plaintiff in Bar pleaded, that the property was in him absque hoc, that it was in Default, which, by West, for the Defendant, is ill, being a Traverse on a Traverse. Adjornatur. 441

Basset *against* Williams.

(56) Error.

ERror of Judgment in Quare Impedit was assigned by Barwell in want of Title, being by Lease for 99 years to commence after all former Advoulons, (viz. Grants thereof,) Tr. 3 & 4. Ph. Mar. were executed, or when the Avoidances before granted were satisfied, which is ill, and uncertain, as Rector of Chedingtons Case, or as Lease for 60 years Habendum to Executors for so many years as should be undetermined at death of Lessee: But, by Allen for the Plaintiff, the Limitation is void, there being no Avoidances granted, and so the Lease shall begin presently, which the Court granted, and it may be Averred that there were none, and need not be pleaded, as a Lease to begin presently. Judgment affirmed.

Couls

Corls *against* Calvert. Siderf. 96. pl. 23.

IN Action of Assault, Battery, and Wounding, the Defendants all pleaded as to the Battery, Justific. quod manus leviter imposuerunt, to remove the Plaintiff from hindering them to remove Cross, and say nothing to the wounding. The Plaintiff replyes, That the Assault and Wounding was de injuria sua propria: the Jury find three guilty of the Wounding, &c. and that other three did only manus leviter imponere. Judgment for the Plaintiff in Lancaster. And Allen assigned this for Error, being a plain Jeofail, the Verdict convicting all of the wounding, which was implyedly confessed in the Bar, being quoad Residuum, which goeth to the whole, which the Plea doth not maintain; which, had there been but one Defendant, had been but a Discontinuance; contrà here, where there are others that are not found guilty. Post. Adjornatur.

(56) Amendment. Yelvert. p. pl 10 Moor 704. pl. 983. 22 H. 6. b. pl. 12. per Ascue.

Holday *against* Holday.

J. S. in Ejectment, come in and pray to be made Defendant, and to plead specially Ancient Demean, which the Court (Foster absentè) agreed; and it's now used as of course to plead Dilatories after Imparlance so, &c.

(57) Ejectment.

Manby *against* Scot. Ante.

Saturday, Novemb. 8.

TUrner third Baron for the Defendant, If this Contract bind the husband, it must be either as hers, which cannot be the Contract of a married woman, being void as well to necessaries as other things, which are no sooner taken up by her, but it's in the husband; he agreed the Cases of Monks and Infants, and Stile *against* West, 3 Jac. a stronger Case, the Contract of an Ideot à nativitate, he may marry, or thus bind himself, it being a true Relief to him, and none can take them away from him: And supposing this the Contract of the wife, yet it's against the Plaintiff, who hath declared of a Contract of the husband, and not of the wife; so if the Contract were made before marriage, the Count must be (as in Trespass against him for her Trespass) of a Trespass done, or Contract made by her, but yet I hold it none of her Contract. 2. It's not the husbands Contract ex natura

(58) Baron & Feme.

rei, for he agreed not to it, either precedent or subsequent; and though this be not specially found, yet his being highly concern'd to maintain her, is no binding Evidence here to find an Assumpsit in the husband, as if it were found no Grant were made of Common in gross, yet if it were found to be said time out of mind, that is a binding Evidence of it, not so here, especially when she departs contrary to his consent, Udalls Case B. R. who forbade his Taylor to trust his wife, being departed from him, yet he did (though forbidden by him) trust her with Apparel, which was allowed to be given in Evidence, and it appearing that the Baron & Feme did after cohabit, and she wore it in his presence, here the Judgment was for the Plaintiff; but yet the Evidence being only found, and no express Contract, it's not sufficient. 3. Its better that she have no power then if she had, however it will be exceeding mischievous to the husband, who hereby shall be forced to pay every Strangers demand of Money for Wares sold to her, so she might take up necessary Apparel of one, then of another, and the last man brings the Action first, and Recovers, so may every one after by combination. 4. The Law hath provided for her better then to be excepted out of the General Rule, viz. the Ordinary: Also the Law of God, and of Nature, hath made a better provision, 24 Ed. 4. 13. per Callow, 15 Ed. 4. 1. b. 1 Roll. 68, 76. 7 Jac. Mantell *against* Wollingtons Case, If the husband enters into Bond on Dures made to the wife, it shall be said Dures to him, the Law looking on her Sufferings as his, and he is worse then an Infidel if he provide not for her: For this reason a collateral Warranty is said to barr an heir on the presumption of affection, which being reasonable, be the fact what it will, the Law is the same. 5. Its not suitable to the Prerogative that God and Nature hath given to him (which is more then of the King over the Subject) to be thus bound by her Contract; this is the reason the husband shall suffer for her Trespass or Slander, because he hath power over her, and may restrain her, or else she would have greater power over him, then he over her; for he cannot bind her by his Contract. 6. It's not reasonable at least that such a wife as this should bind him, whose departure is sufficient to make him jealous, which is the rage of a man, Exodus and Proverbs 6. 34. 3 Jac. Sir Tho. Gardeners Case, the Court were of Opinion the Contract of the wife for necessaries should bind the husband; this is reasonable Evidence to a Jury where they live together, but not full to the Case here, F. Debt 163. The Contract of a woman binds not her self, Ergo not the husband.

2 Brownl. 276. pl. 2. Dures Br. 9.

(2.) Tyrrel

(2.) Tyrrel Justice of C.B. for the Plaintiff, That by the Common Law the husband is bound to maintain the wife he takes, is granted; as to the Verdict he conceived it good enough, having found all the fact, but utrum it amounts to a promise or no, he desired the advice of the Court, as if they had found that A. lent Money to B. but whether this implyeth an Assumpsit or no, he desired advice, unless the Judge, before whom the Cause is tried, direct them; for promise, or not promise, is matter of fact; but whether such Circumstances amount to a promise, is matter of Law. 1. As to the matter of Law, there being no Presidents, we must resort to the Law of Nature. 7 Co. 12. Calvins Case, which is part of our Law. 2. To the Evangelical Law, which saith, No man ever hated his own flesh, against this Law no Prescription or Statute is good: And our Law would be scandalous if it were in the husbands election to allow her, or not, contrary to those two Laws. 3. Reason doth herein guide where Presidents want, 1. Inst. 97. 4 Co. 94. or have no sufficient grounds of Reason, i. e. of the artificial Reason acquired by study and experience, not the prime or degenerate corrupted Reason. This is the use and custom of all Laws in all Nations. Mag. Chart. cap. 7. giveth her rationabile estoverium, 2 Inst. 18. till Dower assigned, which relisheth of that Maintenance he should allow her whilst he liveth, of which she ought as well to partake, as after his death, Feme Covert being a favourite of the Law, and therefore cannot be presumed to be left without Maintenance. Hence also the Law looks on her Dures as done to him. 2. It followeth, that by our Common Law, the husband is bound, 40 Eliz. B. R. Hanywell *against* Hanywell, Action lyeth not by Executors against her for her Peraphernalia, 33 H. 6. 31. b. pl. 5. Administrator Br. 6. 23 H. 6. 3. a. 1 Cr. 343. though there be debts unpaid, for its preferred before debts. Also there is one Law of Nature betwixt husband and wife, another betwixt father and son, that being not common to Beasts, as this is of Procreation. 2. Of the ways and means by which the husband is compellable hereto. 1. He cannot compel her, nor she him, by our Law; contra by Civil Law; yet no reason hinders but that he may be charged by a third person collaterally, 11 Co. 61. as well as by her Tort or Trespass, else it may fall out, that though he cannot murder her, yet he may starve her: The differences of having right to Advowson after Usurpation without remedy, &c. and this is, that there the Act of the parties by which it is destroyed, contrà here where only the act of Law takes it away, 1 Inst. 146, 169. & quando aliquid conceditur, concedere videtur & id sine quo

Covenant that *Baron* shall give his wife 20 l. or a Gown, *&c.* is good. 27 H. 8. 27. pl. 12. Moor 194. pl. 343.

res ipsa esse non potest, 9 Co. 90. Pinchons Case, for this reason Action lyeth for Rent on owelty of Partition, 1 Inst. 240. 2. The remedy here be agreed, Debt F. 163. That by general Contracts, 21 H. 7. 40. F. N. B. 120. B. Contract Br. 33. 1 Inst. 112. she cannot bind him without his assent; contrà for necessaries, 11 H. 6. 30. per Martyn, which is the end he there driveth at (not whether she may borrow Money, or not) but that cannot be excessive, 20 H. 6. 21. per Martyn, 2 Cr. 257. Lord Boroughs Case is a stronger Case then ours. Hut. 205. admits this point, 12 Jac. C. B. Sir H. Comptons Case, per totam Curiam, the husband was compelled to pay for Cloaths taken up by the wife; the Contract of the wife for Goods, though they come to the husbands use, is void, if not bought for his use at first. 2. Though they come to his use, if he assent not, he is not bound; but our Case implyeth both, 27 H. 8. 25. her Contract by his assent is good Evidence in Action against him, and Count on his Contract, and he is at no prejudice by his being hereby prevented to wage his Law, because marriage is his own act; and as Slades Case and Pinchons Case, it is in Election of the party to bring Debt, or Action upon the Case, both remedies being ancient, but the Action upon the Case applyed but lately. Also in our Case no Remedy is in Chancery, Latch. 169. an Assumpsit as well as Debt lyeth against an Infant for necessaries; and thus hath the practise been these twenty years past by learned Judges, whose Experience was acquired in good, though they lived in bad times: And that there was no Spiritual Courts, was no reason to alter the Common Law: Also Trover may lye against husband for her Conversion, and should not he be chargeable by marriage, 8 Co. 171. 2 Inst. 17. she would be worse then by committing Felony, to whom reasonable maintenance is allowed. 3. That the Ordinary will give remedy in these Cases, 2 Cr. 364. is more specious then satisfactory, the Common Law taking away all she hath, and sending her to another Court for Relief: Hyats Case was only a Suit for Separation, 8 Jac. Agars Case, in which Case Alimony is by them allowable, not by Original Suit, where the parties cohabit, or are not separate, as here, Register 34, 37, 38. Old N. B. 35. F. N. B. 41, 48. Attachment upon Prohibition 8. but if one might Sue there, it's no Argument that one may not sue at Common Law; also they only excommunicate, not sequester the Estate, as at Common Law, and to presume one will not lye in Prison rather then pay Debts, is contrary to Experience, and the Judgment of a Learned Parliament that giveth Execution against Lands of the Debtor dying in Prison,

For saying *H.* keeps Bawdry, Action lyeth in Spiritual Court, or at Common Law.

son, in which Case the wife hath lost all; and he doubted it would be harder to maintain the Estoverio capiendo then this Case: Also this Excommunication is but minor, and easily discharged; also none will trust her when they see her without remedy; the Supplicavit for the wife against the husband is only for to keep the Peace, not to provide her Food or Maintenance; if it were, yet if he lye in Prison, her benefit would be fruitless; as to the Circumstances of this Verdict, it appears not for what cause she went away; and though it were contrary to his will, yet not contrary to his beneplacitum, who might have dissuaded or hindred her departure; but had her departure been an Elopement he doubted whether he should not allow her Maintenance, Westm. 2. c. 34. 1 Inst. 32. 2 Inst 435. but had she been an Adultress also, at Common Law she should have Dower, and now notwithstanding Adultery shall have it, and here it appears she departed with Animum revertendi; however, so long as she is his wife, though she commit Felony, or be Attainted, he is bound to keep and maintain her, as is collected from 28 H. 6. 4. 9 Co. 87. he also is as much inexcusable in not receiving her when she offered her self; for no certain time is limited by our Law of her departure, for him to take advantage of to refuse her again, all Laws against this Law of Reason are void; and so of Prohibition, supposing the Case within it signifieth nothing also, unless the offence be greater than here is exprest; he is compellable to receive her by a greater Authority 1 Cor. 7. 10. & 11. then that of Esther 1. 17. which was but politick Advice of Heathens in their Cups: Also the Inhibition, as it refers to the Defendant, is void; for else he might inhibit all that would trust her, as well as one; where the husband giveth authority to the wife to contract, he may repeal it; contrà where the Law giveth her such power as here, Stanf. 27. Coron. Br. 142. also she is no Felon by stealing his Goods, 20 H. 7. 2. also he agreeth to be thus obliged by the Marriage, and therefore it is not in his Election to do it, or not after: If A. imployeth B. as his Bailiff to prohibit C. to trust him, is to no purpose, but A. is bound (notwithstanding his Inhibition) by B's Contract: And so in our Case, so long as she is his wife, a Stranger may trust her contrary to his Inhibition; for though it were for her Apparel, yet its his also: Should she come into a Shop, and cause Wares to be cut out, and take them away, the husband is chargeable in Trespass or Trover; and its more honourable to be charged in Action without damages, then with: Also the Law is not to be altered, 7 Co. 27. (but only by Parliament, not by the Judges) for it's inconvenience; the danger of set-

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ting up two Judicatures in one Family, is not in this Case, for it shall be tryed by Jury, as Maihm done to her, Lit. Sect. 212. but yet her will is not so subject to his, that if his be unreasonable, yet it must be an uncontrollable Law; this can be no Argument for wives departure from husband, being only pro victu & amictu, not for Variety, or for Jewels or Money, which he ought to allow without Suit; in this Case only the Purse of the Husband is lyable, in the other her Life also; now he may keep her, in the other case he must part with wife, and marry by the Ordinaries Law, also he that trusts her last, doth it at his peril; and it's not in the husbands power to strip his wife, as the words of the Supplicavit shew: Also the Law in many Cases, as F.N.B. 25. K. giveth liberty of Court as well as of Suit, as for taking away the wife; nor doth it follow that the husband shall be hereby double charged, for when the effect is had in one, it shall not after be had in the other, Hub. 225. Needlers Case is a Law of Nature, which admits of many Exceptions, as in cui in vita, & Hub. 225. But the Law of Nature of the husbands providing for the wife hath no Exception; and therefore to be preferred; and though the wives will be at the husbands, yet not her life; and the husband shall not hereby take advantage of his own wrong: Besides, this will make men that part with their daughters, to provide such fetters for the husband, that his will shall be always subject to theirs. Ante.

Error Br. 137. Moor *against* Plowman. Ante.

Monday, Novemb. 10.

(59) Error. That the Prorogation is to a day certain, and that taken notice of by the Writ of Error, yet a Return of a whole Term is no Supersedeas, Limry *against* Langham, & 5 H. 6. so here, for it may here be further Prorogued.

Tull.

Tull *against* Osbaston. Siderf. 90. pl. 11.

POwis prayed Prohibition to the Arches on Citation out of the Dioces, the Defendant procured Letters of Request of the Archdeacon, which being subject to the Ordinary, (Hutt. Dr. James's Case, Hub. 23 H. 8. cap. Jones's Case, Hub. 186.) it was said he cannot transmit his Jurisdiction per saltum, but first to the Ordinary, and so to the Archbishop: But by Windham, generally all peculiars are immediately subject to the Archbishop, and that it's subject to the Ordinary, must be special suggestion. 2. Such Letters of Request cannot come in by suggestion only, but must be entred, that so Plea may be had to it, which the Court agréed to be the regular way, and ordered the Defendant to plead his Letters of Remission, and granted Prohibition. Nisi. (60) Prohibition.

Coxe *against* Geering. Ante.

UPon suggestion that the County where H. was arrested by Process from the Lord Marcher was English, the Court awarded Prohibition according to Course, which is either to the Court, to the party, or to both. (61) Wales.

Dethick *against* Yaxley & Uxor.

FEme Covert in Suit against Baron & Feme is arrested, and giveth Bond for her Appearance, and now prayed to be delivered on common Bail, the Sheriff having returned Cepi Corps of the Baron & Feme both, having only taken her, which the Court denied after return of Cepi Corps, contrà if Non est inventus had bèen returned as to the husband; but yet if it appear only a practice, they will discharge her, to examine which, they gave Rule for the Sheriff to return the Body of the husband. (62) Baron & Feme. In Default Br. 52.

Dove

Dove *against* Darkin in Continuance, Fitzh. 16.

Tuesday, Novemb. 11,

(63) Error. Siderf. 93. pl. 17. Execution sued by Executors in the name of the Testator being dead, is void. Stat. Merchant Br. 43. Jones 410. Error Br. 117. Error Br. 144.

IN Ejectment, Judgment in B. R. being had, and Scire Facias against the Plaintiff quare Executio non, &c. The Defendant assigns for Error, that the Plaintiff was dead before the Verdict in the Ejectment; upon Issue of the parties joyn'd by Attorney, in the Scire Facias that he was living, the Jury found he was dead; which, by Allen, cannot be, without making Executor or Administrator party; for else there is no proper persons to joyn Issue but the Man in the Moon. By Twisden, though the party be alive, there can be no other course but to punish the Attorney, and by Affidavit or Information ad informandam conscientiam Judicis; but no Error in Fact can be assign'd without making a true party. Adjornatur.

Siderf. 91. pl. 12. Berry *against* Wheeler.

(64) Execution. [illegible]

MAynard for the Defendant in Ejectment in Evidence, excepted to an Extent under which the Plaintiff claimed, because after Execution by Fieri facias of part, Elegit was for the whole, without mentioning any thing levied by the former Elegit which recited the Scire Facias, but was returned Nichil. But, by Allen, nothing here appears but an Award on the Roll of Elegit, and a Vicecomes non misit Breve after another is taken out, which being filed, the party hath no remedy but by Aud. Quer. no such Recital of the Scire Facias being in this second Elegit; but the Defendants Suggestion not appearing on Record, Maynard waived it. 2. He objected that it appears that more then a moiety is extended; for its said that the Defendant was seized of a Rectory of the value of 100 l. and other Lands appurtenant, quæ quidem Rectoria sine terris Glebalibus is the Moiety, which is not like a Conveyance or Agreement of parties, but in brevi adversario; but it appearing that the Rectory consisted of Glebe and Tythes, &c. else by Twisden, it is no Rectory, but a Parsonage; but here it may be understood of the Church-yard, &c. distinct from the other Lands pertaining, which the Court (Windham absente) agreed, and as long as the Extent continueth, it cannot thus be denied but there is Glebe; but in Count of Ejectment of Rectory, H. cannot give Evidence only for Tythes, per Curiam, contrà by Wild for the Plaintiff. 3. Its said that the Rectory delivered was a Moiety, not saying

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ing according to the value or quantity, which by Maynard is ill, Sed non allocatur. 4. It was not said tenend' in seperalitate, sed non allocatur.

The Lord Fitz-Williams Case. Ante.

Wednesday, Novemb. 12.

A Udita Querela is Supersedeas of Execution per Curiam, though grounded on the Secondaries Report, or other Suggestion; but the Plaintiff shall not be bailed, unless it be grounded on Release or Deed, &c. 2. The Court conceived the Attorney ought to be punish'd, that knowing one lived in Westminster upon Judgment on Action in London brought Scire Facias, and return'd two Nichils there without any Testatum. (65) Execution.

Sider. 89. pl. 8. Butler *against* Yateman. Ante.

POwis moved against Prohibition, that it ought not to be granted here, because the Bounds of the Parish are not in question, but only of the Mill: But if it were, yet it could not be tried by Suggestion, without pleading; for they having Conusance of the Principal, this Bondary is but Collateral, as F. N. B. 50. contrà by Holt for the Plaintiff, these parties being not Spiritual, but Patentées of the King, Latch. 116. Huttons Case, & Yelvert. 92. and so the Bounds are properly triable at Common Law, it being the main Question, Whether it be within one Tything within the Mill or Borough, 7 Co. 44. b. or in another without it in the same Parish, Hub. 296. But by Powis, here only the Close, out of which, is only in question, not the Mill, 13 Car. Whiscars *against* Fuller in Roberts Case, 12 Co. 65. Twisden saw no difference betwixt the Bounds of Tything, and of the Parish, but it never was granted upon Suggestion of the Bounds of a Mill, being only incidental, and against common right, and therefore though question Temporal, is triable at Common Law, which the Court (contrà Mallet) agreed: And by Windham, should A. sue B. for Tythes of a Close, and B. saith he is not owner of it, this shall be tried in the Spiritual Court; the Court denied Prohibition, and the Authority of Yelvert. 92. (66) Prohibition.

In Chattels Br. 11. Buxton *against* Bateman. Ante.

(69) Church. THE Plaintiff counted that he was seised of an ancient Messuage, and that he, and all, &c. have used to have a Seat in a Pue in Cella or Quire of the Church, not saying he used to repair; which, by Williams, is well enough without; that Reparation is good Evidence, but need not be pleaded, especially this not being within the Body of the Church, which is generally to be repaired by the Parishioners, 2 Inst. 489. so of publick Isle, otherways of particular Isles, which by Common Law the particular persons are bound to repair, and so need not shew it, for it may be for other Causes then repairing, as for being Co-founder, or haying been contributory to its building, 3 Inst. 202. Corven *against* Prin, 12 Co. 105. Also this Question is betwixt two common persons, which is stronger then if it had been betwixt a common person and the Ordinary, or the Parish, 1 Inst. 121. b. 122. a. Also this is after Verdict in Action upon the Case, Latch. 116. Allen for the Defendant, It doth not appear but that this Cella is part of the Body of the Church, but if it be not, the Law is the same, Noy 104. Day *against* Bedingfield, for the Prescription must appear to be legal, and on good ground, and not only by usage, Co. Entries 8. And there is no more reason why a Prescription must be to repair precisely in a Prohibition, then in Action upon the Case, in both the party may plead the same; and if it be necessary in point of Law, it must appear at Common Law in Declaration; contrà in the Ecclesiastical Court. Foster conceived consideration ought to appear by pleading. Twisden doubted whether of necessity they ought to plead it; and cited a Case about 4 Car. 1. one prescribed for the upper end of a long Seat belonging to his House, and adjudged good, Noy 78. which Windham agreed, the property of the Founder is not altered by Consecration, and by this Prescription the Freehold of such Pue remains in the party, not the Parson; but yet being after Verdict, though this be great Evidence, it is doubtful whether it ought to be pleaded, and both denied the difference of Prescription and Usage, and of Suit at Common Law, and in Spiritual Court: But by Allen a Composition betwixt Parson, Patron, and Ordinary to allow Seat, is only a ground in Spiritual Court, not at Common Law: And by Foster, there is a great difference betwixt an Isle of the Church, and the Seat in an Isle, which may be since the Foundation of the Church; Mallet agreed with Foster.

Adjornatur.

Herbert

Herbert *against* Roberts & Uxor.

IN Error of Judgment in C. B. Allen in Action of Escape for the Plaintiff, moved a Variance betwixt Verdict and Declaration, The Count was that the Defendant by virtue of a Cap. in force was taken, &c. 15 Apr. 1657. Verdict find that there was a Writ of Hill. 1656. retornable at a certain day therein contained, not saying that it was the Writ in the Count, nor can it be intended. Sed non allocatur. The point of the Judgment in C. B. was, that H. had counted on arrest of Baron & Feme; the Jury found they arrested him, saying nothing of the wife, and held good, being variance of Fact, which alters not the Writ on Special Verdict, Foster *against* Jackson, Hub. Judgment affirmed, Nisi. (68) Variance.

Smith *against* Conyers.

ERror of a Judgment in Durham in Assumpsit, without shewing for what sum, and counts in consideration quod emisit a certain quantity of Coals the Defendant C. promised to deliver them, which, per Curiam, is good enough. 2. Another Case of Error in Action of Covenant on Articles, wherein Breach was assigned, that the Defendant did not pay 20 l. during the time of a Lease made by the Plaintiff to the Defendant at the several days therein mentioned, which, by Allen, is ill, and the Breach must be assigned particularly, so that the other party may plead to it. Windham conceived it well enough; as if really a Breach had been at every day; contrà in Debt on a Bond to perform, which Twisden agreed: But by Allen, he might have pleaded he did not pay at such, or such a day, or that it was generally not paid; but as it is, none can tell what he will insist on before Jury, whether Breach at one, or every day, and is contrary to all Presidents: And though this may be cured by Verdict, yet not here, the Judgment being by Nil dicit, and so the Jury ought to try all, as on Non debet pleaded in Action for Rent on Lease; and this involved Issue is better then prolix pleading several Breaches in several days, which must have several Issues. Judgment affirmed in both. (69) Assumpsit.

Lathwell *against* Palmer.

(70) Usury.

IN Action of Covenant on Bill of Bottomree, that the Ship intended to go forth should proceed to *A.* and should not deviate directly or indirectly. The Defendant pleaded performance generally. The Plaintiff demurred as insufficient, quod non deviaret being negative: And the not being said quod procederet directly, per Curiam, the Plea is ill, as if they had been several Covenants; but the Court advised Amendment by Agreement.

(71) Prohibition. For Annuity awarded to Parson, Vicar, &c. by the Ordinary, as an Arbitrator shall be at Common Law, 3 Ed. 3. 17. pl. 24.

WIlliams moved for Prohibition to the Consistory Court of Hereford for the Administrator of the Vicar against the Parson, the Suit being for a certain Annual Sum, Co. Entries 445. 1 Cr. 217. which shall not be intended Pension, unless mentioned; and that for the same cause Prohibition was awarded in C. B. upon motion of Serjeant Earl, but the Court refused to grant it here, F. N. B. 51. B. especially the Suit being betwixt the Parson and Vicar; though it was alledged that for this Arrear an Action of Debt did lye at Common Law.

In Custome Br. 44. Wiseman *against* Cotton. Ante.

Entred Hill. 13 & 14 Car. 2. Rot. 476.

Thursday, Novemb. 13.

(72) Custom. General Custom of Borough Engl. goeth not to Brother, Hitch. 11. pl. 30 Not to Son without special Pleading, Hub. 31. Suit by *ex gratia Quer.* is not incident to Burgh that may devise by Custom, 39 Ass. 6. Br. 354. Nor is Custom to devise incident to a Vill or Burgh. 40 Ass. per Wind.

IN Action upon the Case upon a feign'd Issue out of Chancery, that the Manor of Farmingham was not devisable by the Custom of Kent, Jury find 2 Ed. 6. cap. that the Lands inter alia of Sir H. Islip, which then were Gavelkind, should be changed, and not be departible among Heirs, but shall be as Lands at C. Law to all intents, as if they had never been of Gavelkind; they find the Lands in question part, and that all the Lands of Gavelkind are devisable by Custom. Jones for the Plaintiff, the only Question is on the Act 2 Ed. 6. whether it take away as well the Custom to devise as the partition, or only the Custom to be departible as at C. Law, the words being as full to abrogate the whole Custom, as can be devised; else the latter Clause, That they should be as Lands at Com. Law, cannot be satisfied to all intents and purposes; for at Com. Law Lands were not devisable: Also at Common Law she shall have but a third, and if this Custom should stand, she would have half;

and

and this appears by the different penning of this Statute, and 31 H. 8. cap. 3. which is only that they shall be disgavel'd, and no further; and most of the persons named therein, some of great Judgment, are again named in this of H. 8. The intent of 2 Ed. 6. was to preserve those Families, that it might not be diminisht, which was done by partition, and also as pernitiously by devise and dower, and the practice hath been according to this Opinion of taking away the Custom. Winnington for the Defendant, argued only what is intended by the custom and nature of Gavelkind, which is only intended by the Act to be defeated, which by Lamberts Peramb. 584. Spilmans Gloss. verbo, Gavelletum is only the discent among Heirs males, and to devise is a Custom distinct from it by itself: So 1 Inst. 140. Lambert 251. 2 Ed. 4. 18. b. the custom to have dower or devise must be specially pleaded; contrà of the general custom of Gavelkind, 5 Ed. 4. 8. 1 Cr. 461. Launder *against* Brooke, Da. 50. And it may be Gavelkind, and yet not devisable, nor the Feme have Dower. 2. It shall be at Common Law as if it had never been Gavelkind, F.N.B. 190. 200. B. but no otherways, for it's not inconsistent with Lands at Common Law to be devisable, and so to all intents and purposes, is only as if it were not Gavelkind: This also is the intent of the Act, that the nature of the Discent is only to be altered thereby; and therefore its said, That it be hereafter in no ways departible, &c. and this was to preserve Families, to which end to devise was a benefit and privilege. Twisden conceived that it was always hitherto taken to be of the nature of Gavelkind to devise; and unless it be so, it will return again to Gavelkind; for when it cannot be proved that such Lands belong to any named in the Act, Country men that purchase part will take it to be of the general nature of the Custom. Windham conceived the general words must be circumscribed by the particular, which is principally that of Discent, which Foster agreed as the mischief the Act only intended to relieve; but yet would not suddenly turn the Tyde, as used contrary. Adjornatur.

Customs and Usages, Poult. Abr. §.

Forfeiture Wingate §. 4. in the Stat. 17 Ed. 2. cap. 16. several distinct Customs of *Kent* are recited, without mention of this Devise. Prerog. Poult. §. 15.

Holden

Holden *against* Swindall.

(73) Travers. IN Treſpaſs, the Defendant pleaded Charles P. was ſeiſed in Fée, and leaſed 4 Jac. to Hall for three Lives, which H. aſſigned to the Defendant, whereby he put in Beaſts into Common. The Plaintiff replyes (abſque hoc) that Charles P. was ſeiſed in Fée when he made the Leaſe. The Defendant confeſſeth that C. P. was Tenant for Life, and enfeofft Hall, but that before Seiſin of C. P. the Lord Powis was ſeiſed, and levied a Fine to the uſe of himſelf, Reverſion to H. P. who enfeofft Holden, Leſſor of the Plaintiff. The Defendant rejoyns, and confeſſes the Fine, but ſaith that H. P. dyed before C. P. abſque hoc, that Henry enfeoffed Holden; on which the Plaintiff demurred, as an ill Travers. But by Wilmot for the Defendant, the Travers in the Replication is ill, being of what was confeſſed and avowed before, viz. the Seiſin of C. P. 13 H. 7. 12. Stoners Caſe, 27 H. 6. 1. the difference is betwixt an Aſſize and Treſpaſs, 2 Ed. 4. 11. where Title is neceſſary to be made, there H. may travers the Seiſin confeſſed before; contrà in Treſpaſs, which is but a poſſeſſory Action. 2. It is a repugnant Plea in Replication, which confeſſeth the Feoffment of C. P. and conſequently a Fée in him, and ſo cannot travers it after, F. double Plea 11. which the Court denied; contrà if Tenant for years be ſaid to make Feoffment. 3. This is a Travers of Matter in Law, as 7 Ed. 4. 13. by Danby, and ſo void. 4. It's of an Implication which is void, as by Fitzherbert in 27 H. 8. 48. Windham conceived the Travers was moſt proper, and it's not like the confeſſing that Leſſée for years enfeofft, which admits a Fée in him; contrà of Tenant for Life. Alſo it's not here ſufficiently confeſt without Travers; for if C. P. had Fée, the under Leaſes are good, elſe not: And in Treſpaſs, if the Defendant pleaded J. S. was ſeiſed in Fee, and enfeofft, the Plaintiff replys that he was ſeiſed in Fee, and leaſed to J. S. for Life, abſque hoc, that J. S. was ſeiſed in Fée, it's good: And per Curiam, this nor the Caſe at Bar cannot be pleaded otherways.

Judgment for the Plaintiff, Niſi.

Dove

In Continuance F. 16. Dove *against* Darkin. Ante.

IT's assigned that the Plaintiff in Ejectment was dead before the Judgment, in a Writ of Error the party himself, by Attorney, joyned Issue that he is alive, and its found he is dead, which by Allen is void, without Scire Facias against the Executors or Administrators. Windham agreed, that if no party had been summoned, it had been ill; but here its well enough, as Rast. Entries Brief in division under Mortmain; for if he be alive there is an end of the Case, as after Darrain Continuance the Defendant pleaded death of the Plaintiff, and the Attorney joyned Issue thereon for the Plaintiff: But by Allen, there is a rightful Attorney constituted, contrà here; for if the party be dead, there can be no Attorney: But by Windham, the Court will suppose one when such Entry is made, and there needs no Scire Facias, unless none come in to plead. Twisden conceived, that upon Error brought the Errors must be assigned, and the party may come in and alledge the other dead: But here the Verdict hath found he is dead, which makes a Discontinuance, which Foster agreed, being the very Error assigned; contrà if he had been found alive. But it's necessary, by Allen, in Errour of Judgment in Debt or Trespass, to have Scire Facias against Executors or Administrators, especially when none appears; and here upon Error assign'd, a new Attorney is made by the Plaintiff; but by Windham, he is punishable by the Plaintiff, but not the Judgment Reverst. Anjornatur.

(74) Such Plea is good so long as the parties are demandable, or may plead 2 H. 6. 13. pl. 6. but after Writ of Enquiry awarded by default, its ill, 9 H. 4. 1. pl. 4. So after Issue joyned and *Nisi prius*, such Plea is frivolous, and cannot be joyned by Attorney, by *Forteſcue*, 31 H. 6. 15. seu 8. pl. 4. yet Attorney may plead *mort on depoſition, &c. puis Dar. Cont.* 9 Ed. 4. 24. pl. 31. But if the Defendant plead *mort del Plaintiff*, the Plaintiffs Attorney cannot confess it, 21 H. 6. 10. pl. 23. by *Markham*. The death of Attorney doth not abate Writ, because the Continuance is in the name of the Master, 5 H. 7. 3. pl. 7. Or notwithstanding a *Prece partium* taken out after the death of *A.* yet if the Defendant do confess *A.* is dead, the Writ shall abate, 26 E. 3. 70. seu 16. pl. 6. in Continuance Fitzh. 16.

The Warrant of Attorney is determined by the Judgment, unless to some purposes, as acknowledging of satisfaction, &c. but the Writ of Error is *quasi* a new Suit, in which he cannot plead on the old Warrant *Quære*, fol. 107.

Pettyware *against* Hamson.

NOta, That if Committitur be entred in the Marshalls Book in an Action of Escape against him, H. must prove he was in his Custody since the time; contrà per Curiam, where it's entred on Record; but by the Clerk, and Wild the Kings Serjeant, the Course hath always been of late, that in case it be entred on Record, yet H. must prove that he was in Custody since that time, because its the usual Course to enter Committitur against every Defendant, though he be upon Bail.

(75) Escape.

Bail. Wherefore they ordered the Marshall to shew whether one were in Custody, or no, inter Pettyware *against* Hamson.

In Departure Br. 10. Mould *against* Wallis.

(76) Apprentice. Moor 135. pl. 280. doth impliedly grant it's no departure. Godbolt 122. pl. 143.

IN Action of Covenant against an Apprentice, Breach assigned in not serving him: The Defendant pleaded Nonage. The Plaintiff replys by the Custom of London, which by Jones for the Defendant on Demurrer is a Departure, 1 Inst. 304. Kelway 76. the Abbot of Buckfaces Case, Yelvert. 13. pl. 22. Hoell for the Plaintiff, 21 H. 7. 17. Feoffment. The Defendant pleaded Nonage: The Plaintiff replys by Custom of the Mannor, and held good, contrà to 37 H. 6. 5. pl. 9. and so in 3 Cr. 652. but contrà where one alledged general Custom in the Count, and replys by a Special. Windham, This is no departure from the Title, but is an answer to a disability pleaded in Barr, as where in Action the Defendant pleaded Moin professe; the Plaintiff Replys, that before the Action he was veraign'd, agreed good, which the Court agreed. But by Allen, all the Presidents are to Count on the Custom, this being the very ground of the Action. But by Twisden, Hutt. 63. Gennings *against* Pitman, H. 5 Car. Gilbert *against* Fletcher, The Action is founded on the Covenant, not on the Custom, 21 Ed. 4. 6. pl. 17. in Labourers Br. 42. Infant Fitzh. 2. & 5 Eliz. 4. 6. 43. b. 1. Infant is not bound by Collateral Contents, but only of Apprenticeship, 6 H. 7. 8. Adjornatur.

1 Cr. 159.

Tripit *against* Reynolds. Ante.

(77) Assumpsit.

ALlen prayed Judgment for the Plaintiff, that the promise is created by operation of Law, and so no necessity to alledge to whom the promise was, but the wife that is to have benefit may sue for it, though the Consideration moved from the Husband, as Rippon *against* Norton, 3 Cr. Bayfield *against* Spencer, and Agar *against* Goddard, in Consideration the Father would settle in Marriage on the Son, one promised to pay to the Father, yet the Son may have Action, so here. Twisden, Had the promise been made express to the husband, as Frenches Case, to the Father, there the Son could not have Action unless it be upon Marriage. But by Windham, either party may have the Action where both are to have benefit of it; contrà where Money is to be paid to a third person to the use of the Assumee, for there only he shall have

have the Action, as where promise made to an Attorny or Servant to pay the Master for Wares sold, only the Master shall have the Action. Adjornatur.

Freshwater *against* Piggot.

H. Charg'd as in Custodia, may plead Priviledge, which the Defendant did under the Great Seal, being Clerk of the Chancery. (77) Priviledge. Hut 63.

Lumberston *against* Thorpe.
Friday, November 14.

IN Trespass, Special Verdict being found for the Defendant a Souldier under the Parliament so called 1659. that as such he used the House, and find the Act of Oblivion, and the Repeal in Relation to Sir G. Booth, when the Secluded Members came in, after which, viz. 25 July, the House, for which the Action is brought, was taken: which, by Windham, was intended that none should proceed Criminally against such, but still the property is in the Owner, which the Court agreed. Adjornatur. (78) Pardon.

Crawford *against* Middleton. Ante.

ALlen prayed Judgment, this being as much as a positive Charge, that he had stole the Mare; and the Case in Hub. 177. that H. was in Goal for stealing a House, hath been otherways ruled. 2. The Ubi revera that no such words were spoken is not necessary; the words being layd false and scandalous, though the Relation of another; but it had been moved according to Presidents, but here the falsity and Scandal must refer to the relation, as in Indictment that H. did falsely depose, the Plaintiff need not aver Ubi revera, the matter was false, and this is found all by Verdict, but the words were not laid quod falso, &c. but only quod Hæc falsa, &c. verba. Windham, the words shall not be aided by intendment, because the Jury only enquire of the words, not of the falsity, and agreed the Case in Hub. 177. which shall be intended that he was in the Goal before. Twisden, Ubi revera I never conceived of any use, the Scandalosa verba refers to all, and I conceive the Case in Hub. 177. scarcely Law, it being a Scandal to have such an imputation laid on him. Mallet and Foster agreed with Windham, the Scandal must be fixed some where, and if the party can produce his Author, he is cleerd; and therefore the Ubi (79) Slander.

revera is necessary, according to auncient Forms, which is not readily to be altered: But for the words, he conceived Hub. 177. a hard Case, and these words not Actionable in themselves, But if the Narrator cannot produce his Author; but by Allen, the Defendant may Justifie that J. S. told him, and need not take Issue on the falsity, 21 Jac. tryed before Hub. One told J. S. that Cantrell was hanged for a Robbery, and J. S. told the Defendant in another Action so, and not being said falso & fictè, he was found not Guilty, which Twisden remembred, yet per Curiam, præter Twisden, Nil Cap. per Bill.

Annison *against* Perkin.

Mich. 13. Car. 2. Rot. 336.

(80) Error. March. 8. pl. 20. IN Debt on Bill of 40 l. to be paid at Hyam prædict. (which is out of the Jurisdiction of the Court of Jernemutha) being in the County of the City of N. which by Allen is Error, the Count being upon payment generally, which per Curiam agreed ill; So Entry of Continuance, not saying per Curiam; So Continuance is to the next Court, which is said Held 12 Dec. and the Entry is ad quam quidem Curiam tent. dicto. 11. Dec. Windham conceived the leaving out the place but a trick to hedge in Jurisdiction. Judgment Reversd.

Lowd *against* Coledam.

(81) Assumpsit. ERror of Judgment in H. in Action upon the Case; on agreement to pay on delivery of Corn, & indebitatus, &c. Verdict find one promise and the 5th for the Plaintiff, for the rest for the Defendant, and generally Damages assessed. Judgment affirmed.

Morgan

Morgan *against* Thomas.

IN Action of Debt on Bond, Condition whereas L. S. had purchased Land, which discended to W. T. and the Plaintiff was obliged to pay Rent to T. P. now if W. T. to whom he attorned Tenant should save harmless, the Bond to be void. The Defendant pleaded that he hath saved harmless; To which the Plaintiff demurred, as Mansers Case. But by Williams for the Defendant, Mansers Case is to discharge and save harmless, this only to save harmless. But by Twisden, he might have pleaded Non damnificat. for this that he hath saved harmless, doth imply he was damnified; Which the Court agreed. (82) Covenant.

Judgment for the Plaintiff.

Nicholas *against* Pullen. In Br. Cond. 18.

Tr. 14 Car. 2. Rot. 345.

IN Action of Covenant to save harmless, quiet, &c. from suits and lawful Evictions. The Defendant pleaded performance of Covenants. The Plaintiff Replyed, that J. S. took out a Writ of Hab. fa. poss. out of B. R. debito modo exeunte, and by vertue thereof entred on possession of the Plaintiff, and did expel and amove him. To which the Defendant demurred: And by Powis, the Judgment needed not be recited, the Issue being tendered on expulsion, Curia contrà, debito modo is not sufficient without shewing particulars; contrà in Spiritual Court. As by Twisden, to say in Debt for Rent, that H. did demand debito modo is ill; And Allen *against* Thorn, in Debt on Bond to save harmless from lawful Eviction, Dower being Recovered after Bar by Fine, and Nonclaim without exception to it, which might have been taken; it was held no lawful Eviction, and so the Defendant found not Guilty; for the Plaintiff must sufficiently entitle himself. Windham, it is hard here for the Defendant to shew any other Title, being tourned out in Ejectment against fain'd Ejector; but yet conceived it ill, because the Hab. fa. poss. doth always recite the Term of the Judgment, and therefore that must at least be shewed, but not the Title of him that Evicted. (83) Condition.

Judgment for the Defendant. Nisi.

In Condition Br. 12. Nicholas *against* Pullen.

(84) Covenant. IN Debt on Bond for performance of Covenants, one whereof was, that Defendant should not deliver up possession to any but the Lessor, or such persons as should lawfully Recover. The Defendant pleaded he did not deliver, but to such persons as lawfully recovered it; which, by Powis, on demurrer by the Plaintiff, is well enough; and the Plaintiff may shew it was to be delivered to J. S. contrà to Law: and so by Twisden is Stiles, Eals *against* Lambert. Windham 5 H. 7. Condition to deliver so much Bread as required, the Defendant pleaded he did so, which was held ill, without shewing what; so here, he ought to shew that he delivered to J. S. by lawful Title, or else that he delivered none, which Mallet agreed. 2. Here is no Breach necessary to be assigned by the Plaintiff, the Plea being on particular Covenant, which is like Releas pleaded on Arbitrement.

Adjornatur.

Bancomb *against* Aylwit

(85) Ordinary. ERror on Judgment in Debt in C. B. after verdit by Administrator, to whom Administration was said to be committed by the Archbishop of Canterbury, not saying loci ordinarius, which the Court conceived well, being after verdit; contrà on demurrer, for if the Administration belong to the Archbishop of York its void. Judgment Affirmed. So not proffering Letters of Administration per Curiam.

In Error Br. 175. Lawson *against* Witherington.

Trin. 14 Car. 2. Rot. 596.

(86) Days. IN Debt on Obligation of 200 l. upon condition for payment of 100 l. 10 Jan. next ensuing on three Months warning (being dated 1 July) Defendant in Bar pleaded, that he had not three Months warning before the Action brought: To which the Plaintiff demurred, and Weston conceived, that the certain day is 10 Jan. and the Obligée must give the warning 2 d. if the warning be intended three Months before any 10th Jan. then it must be given by Obligor, and so is 3 Cr. 202. Isham *against* Paget, Brief. Br. 77. 3 Cr. 842. Gawen *against* Syms Case, its only a Plea in abatement, which cannot be pleaded in Bar. 3d. The Breach is not

not well assigned, in that warning was not to the Defendant, for it might be to the other Joynt Obligor. Twisden agreed, that 10th Jan. may be intended next after three Months warning, not next after the Bond; But its hard to maintain that the Obligor must give warning, and by Windham, had the Mony been payable 10 Jan. next after the Bond, and three Months warning by the Obligee, though that day pass without warning, yet the Money is not lost, as hath been resolved; but the Months warning may be given after to the Obligor, and he is bound to pay, the ascertaining the day being for his benefit. Adjornatur. 1 Inst. Co. 207.

Horseman *against* Waters.

Tr. 14 Car. 2. Rot. 484.

IN Scire Facias, on Judgment in B. R. by Executor shewing Testator recovered against the Sheriff of S. and that part is unsatisfied. The Defendant pleaded that Administration was committed to J. S. not traversing absque hoc, that the Plaintiff was Executor, and this after imparlance ill, per Curiam, Judgment for the Plaintiff on demurrer by the Plaintiff: So to say that H. dyed intestate without traverse, absque hoc, that he made Will, Greisbrook *against* Foxe, Pl. Com. (87) Executor.

Price *against* Cowly.

IN Debt against an Heir by Administrator, not saying Administration was committed to him, debito modo, nor by whom, which was assigned for Error on Judgment in C. B. which per Curiam is Error; but being mistaken, and the Record right, Judgment affirmed. (88) Administrator. Yet H. need not say that the Archbishop that committed it was *loci ordinarius*. 3 Cr. 457.

Brazier *against* Acton.

IN Debt on Bond to perform all Covenants specified in an Indenture betwixt A. and B. the Defendant pleaded there was no Covenants; to which the Plaintiff demurred; and per Curiam, this being general of all, is well; contrà if it were to perform any certain Covenant; As to be nonsuited in Formedon, he cannot say there is none; contrà to be nonsuited in all Actions pendent in C. B. But the party is Estopt to say there is no Indenture, but he must set forth the Indenture it self, though he have agreed there is such a one: for (89) Estople.

for whither the words in the Indenture, as Deed, &c. do amount unto Covenant, upon Issue, that these are such Covenants, can never be questioned, but only of fact: But the Plaintiff shewing the Indenture, if any Covenants be therein, the Jury must find for the Plaintiff. And by Wild for the Plaintiff, this is a Windlace to make the Bond void; for if there be really no Indenture, which the Defendant is bound to shew, the Plaintiff should be put to shew it. Adjornatur.

Sinderf. 87. pl. 2. Saunders *against* Godfry.

P. 14 Car. 2. Rot. 296.

(90) Jurisdiction. Presentment that Abbe did distrain certain persons (not saying whom nor where) sans cause, shall be intended *infrá* Jurisdiction.

IN Action upon the Case on promise within the Jurisdiction, to pay money on the sale of two Cows, which is not said within the Jurisdiction, but it is express that being in Debt within the Jurisdiction for sale prius made, not shewing where; the Defendant promised within the Jurisdiction; after verdict for the Plaintiff, this was assigned for Error, and per Curiam, though it do not appear the sale was out, yet they will not intend it within the Jurisdiction of Marshalsea, or any other Inferior Court; For the sale, which is the consideration of the Assumpsit, must be enquired of, which cannot be by the Inferior Court.

Russel *against* Lea.

In Coverture Br. 51.

(91) Infant. Penal Bill is void if Infants except to it. Godbolt. 364. pl. 456.

IN Debt on Obligation for Necessaries, no Oyer being demanded, its intended single Bill. The Defendant pleaded Infancy; the Plaintiff shewed that it was pro necessario apparatu & vestitu, not saying it was for him, nor that it was suitable to his degree. The Defendant demurred, but it being said it was sold to him, it shall be intended for him; but 2 Cr. 560. Ive *against* Chester, it must be said necessary, and the particulars set forth, by Foster; contrà per Cæteros, the particulars are needless. Adjornatur.

Manby

Manby *againſt* Scot. In Contract, Br. 19. Ante.

November 15.

Twiſden for the Plaintiff as before, conceived the Verdict very proper, for this being ſufficient Evidence, had the Jury found it, they had made an end of the Caſe, and they need not ſhew the particular, what is neceſſary, unleſs the queſtion had riſen thereon, as Stone *againſt* Withipoll; and as in Ejectment of Copyhold, if queſtion ariſe on the reaſonable Fine, then the particulars muſt be found; contrà where its on demand, ſo 24 Car. Parker *againſt* Coxe; and here is no doubt but its neceſſary; but the queſtion is, Whither it charge the Husband to the point; he conceived the Husband chargeable, becauſe ſhe is wholly diſabled to contract, and therefore when things are neceſſary, the Law will create the Means, as if ſhe take Bread and eat it, Trover lyeth againſt him, 7 Car. City of Weſtm. *againſt* Gerrard, The Defendant a Married Woman, of perſonal Eſtate, ſhe had a Grandchild, who was laid to the Pariſh, and the queſtion was; whither the Husband, (ſo Drapers Caſe, out of Leiceſterſhire) as the Grandfather of the Infant, ſhould keep it, or the Pariſh, and reſolved on reference to two Judges, that though Gerrard were no Grandfather within 43 Eliz. yet for the benefit he had by his Wife, 39 Aſſ. 1. he was bound to keep him; and when the Husband will thus take advantage of his own wrong, in not keeping her, its reaſonable he ſhould be charged; and the diſability of the Wife is no hinderance to contract for neceſſaries, Perk. 4. 14 Ed. 4. 2 i. e. to charge the Husband, as Infants contracts are void, except for clear neceſſaries Convenientiæ, H. 2. Car. As if Infant be Houſekeeper which is not neceſſary quo ad eſſe, yet for ſuch proviſion he is chargeable, B.R. Tr. 15. Jac. Rot. 1374 Hill *againſt* Blackſto 9 H. 7. 21. Leaſe by Infant without Rent is void, and Trover lyeth for Goods delivered with his own hand; contrà of Treſpaſs, becauſe it cannot be ſaid vi & armis, if the Wife be beaten, being abſent from her Husband, and be cured, ſhe is not ſuable, but only the Husband; and its no reaſon this ſhould charge the Husband, more then for meat and drink; for in want of both, ſhe will periſh: So if ſhe have a Child cured, the Law will charge the Husband, Hub. 11. Bridgmans Caſe Maſter of a Ship, who hath only conduct of it, may yet pawn it in Caſe of Danger; and ſhall the Law take care of (92)

She alone is not chargeable Stiles 283. pl. 624.

of danger; and take care of such things, and not of the Lives of Men? To abjured persons the Law yet allows food, &c. (Coron 407. Artic. Cleri. 13 H. 7. 3.) much more here: So Coin for necessity of the House may take up necessaries, not that he can put Life into them, but because else the House would want support, 9 Co. Hussyes Case she shall not suffer Imprisonment for Ravishment of Ward, because she cannot satisfie; so here, because she cannot acquire any thing, the Husband shall be charged: Nor is it much doubted de re, but de modo: Alimony is not mentioned in Art. Cleri, nor Caudryes Case 5. Co. 9. nor in 25 H. 8. Cap. 12. which all Sum up the Heads of the Ecclesiastical Jurisdiction, the Estoveria was doubtless grounded on Excommengement propter sævitiam, and could it be made good (though the practice hath been always against it) it were to the purpose. I agree the Rights of Matrimony 7 Co 44. Kens Case 4. Co. 29, as Divorces, &c. belong to Spiritual Court, but all things that belong to Matrimony is no Matrimonial Cause, 48 Ed. 3. 18. 50. Ed. 3. 90. 19. F. N. B. 44, 45. 52. Ass. 7. promise of mony in Marriage is suable in the Spiritual Court, contrà of promise to give Money to such as shall Marry my Daughter; Debt. 8. and Alimony is not properly a Matrimonial Cause, by reason it depends not on Separation: F. N. B. 139. So the Register must be understood of Debitis & Catallis given in Testamento or Matrimonio, but yet Alimony is 1 Car. Greens Case, a Consequent of the Judgment of divorce in Spiritual Court, and so may be there then allowable; but its hard she should have no allowance, unless she be divorced; and by the Course of the Spiritual Court they do not allow Alimony till separation; and no Case hath been cyted where Alimony alone originally was sued for there, F. N. B. 53. b. 139. and yet if it were, Hut. 116. and 24. Car. Globenyes Case, she hath liberty of Court, and the Suit in the Spiritual Court suits not with this Case, being for necessary support, 2 Car. Penelope Owens Case, in Prohibition to the Marches, it was held the Spiritual Court cannot Sequester Estate, and they will not allow Alimony till causa est contestata, nor after 37 H. 6. 14. So 18 Eliz. Cap. 3. of Bastards, might have provided that the Father should be Imprisoned till he allow the Son Maintenance, but it goeth a surer way that the Parish shall allow present subsistence, and charge the Father after; and it was foreseen, 21 Jac. Cap. 24. that Men would live in Prison rather then pay Debts; and though it be cause of divorce for severity if the Husband take away her necessaries, yet that doth not take away

So to Villeins 22 H. 6. 32. pl. 49. by *Bingham.*

Moor 874. pl. 1219.

away her liberty of charging the Husband, no more then her taking Supplicavit and binding him to the Peace; and if the fault be in the Husband, that then she may charge him, then all the Arguments of her contract fall to the Ground, and the obedience or disobedience signifieth nothing; also could she obtain a separate Maintenance, as she shall in Spiritual Court, and separation beside, then she may rant and live as Feme Sole and laugh her Husband in the face; but if she sue at Common Law, it will make her very cautious how she proclaim her defaults before a Jury in open Court: Also a Trover will lye 21 H. 7. 40. or Tres- Latch. 126. pass if the Contract be void against both, and so she, as Newman. well as he, may be Imprisoned; and if Elopement alone be Cause at Common Law to lose Dower, that is when she is become Feme Sole, and able, but she doth not hereby lose Food and Rayment during Marriage; nor is it said sh. shall lose Alimony in Spiritual Court: Also here is no time defined, when such Elopement shall be a forfeiture. 3. As to the Prohibition, its annexed to the liberty of the Wife, and so void, contrà where annexed to Feoffée, as not to Infeoff J. S. Also should he adhere to the Enemies of the King or have the Plague, she may be a good Woman, and yet refuse to go with him; and therefore there is no reason she should want Maintenance for such Cause: Also this is an incident inseparable to her, and there is no reason the abuse of the Mercer should take away her use of such things as the Law alloweth. I agree the Case of the Wives receit of Rent to be void, but that's nothing to necessaries: Also we defend the Liberty of Common Law, and so though Plaintiffs are not put to shew Authorities, but such must produce them that would draw the Cause ad aliud examen, as the Defendants, 11 H. 6. 30. by Martyn is put as a Case unquestionable, and so is a full Authority; and the Opinion of the Court went a Step further, that he need not say the things were for the necessary use of the House 8 Car. Jones said it had been adjudged in Bill *against* Lake, that the Cause of Action began by the request that this is a new Action, cannot be said, seeing the several Opinions before, yet it hath not been very frequent before; but before 12 H. 8. no Action upon the Case lay against the Executor on promise of Testator, but many Authorities to the contrà, 7 H. 7. 12. 11 H. 7 26 Only Norwoods Case; Pl. Com. 183. So of latter times, Action upon the Case on 43 Eliz. 6. 12. Policy of Assurances, so Assumpsit *against* Feme for not marrying with him, lyeth now at Common Law every day; Also when this Action was brought,

no Alimony was allowable, the Courts being taken away, of which the Stat. 17. Car. taketh notice, and all the Spiritual Law is but Branches of the Common Law, and therefore when they cease, they return again to Common Law 12 H. 7. 18. Atkins for the Defendant as had been argued before.

In Incumbent. Br. 7. Broad *against* Hall.

November, Monday. 17.

(93) Quare Impedit. Sinderf. 93 pl. 18. Twisden denyed the Opinion in Bosvills Case, 6 Co. 51. b. and conceived that H. that recovers in Quare Impedit, as Hub. 127. pl. 15. shall remove the Incumbent whoever he be, unless the presentation of H. be obtained pendente placito; but the Incumbent, if he have a better Title, may have Spoliation, which the Court agreed.

Adjornatur.

In Chattels. Br. 11. Buxton *against* Bateman. Ante.

(94) Church. If the repairing were but matter of Evidence, the party need not alledge it as Suggestion for Prohibition, no more then in prescription, because no Issue can be thereon: And the matter being Ecclesiastick, there must be a Temporal Reason given to draw it thence, and so are all the Books: and in this very Case a Prohibition was granted in C. B. because that by the Common Law he must alledge he doth repair, whereas usage alone, in the Spiritual Court may be sufficient by their Law. Winnington for the Defendant, 2. Cr. after Verdict its well enough, as prescription for Common not saying pertinent. but only for Beasts levant and Couchant. Twisden, upon advise with some other Judges conceived in Action upon the Case, its sufficient to prescribe generally, but in a Prohibition (as all the presidents are) they doubt it is necessary to alledge a Cause; but here its not found, tanquam ad messuagium pertinent. which may be for other cause then of reparation, but only that all such as had ancient house have used to sit, which may be by placing of the Ordinary; and its not like the Case of Common, which shall be intended pertaining to the Land after Verdict. Windham agreed the distinction betwixt an Action upon the Case, and Prohibition, the one taking away the Jurisdiction of the Ordinary, the other not; and it doth not appear whither Isle peculiar or not, and therefore it shall be intended it is, now after Verdict: But the not saying ad messuagium

ſuagium pertinent. its ill; which Windham agreed. The Court agreed the preſcription ſufficient in this Action, but upon this laſt point of not ſaying tanquam ad meſſuagium ſpectant. Adjornatur.

JOnes moved for Prohibition for Cookſon Adminiſtrator of Pots, to the Biſhops Court of Lincoln, upon Suggeſtion that the laſt Incumbent was for ſome time put in by the late Uſurpers, and ſo by the Act of Oblivion is to be diſcharged for ſo much in Suit there for penſion, as in Action for Tythes, if H. Suggeſt its barren ground, on 2 Ed. 6. he ſhall have Prohibition preſently, which the Court here denyed, before this he pleaded in the Spiritual Court: And it there appears this to be the ſingle Iſſue, whereby the party hath tyed himſelf up, and then if the Spiritual Court will not allow the Plea, Prohibition ſhall be granted, as in Action for Tythes, if the Defendant pleaded unity, and ſo diſcharged by the Statute, then Prohibition ſhall go, but not before. (95) Prohibition.

Hurſts Caſe Ante.

RAymond conceived on the Rules of Bags Caſe, that Mandamus lyes to reſtore an Attorny, Co Entries 436. which is as much an Office of Adminiſtration of Juſtice as Steward; and they are compellable to ſerve the parties as Attorny, 1 Inſt. 295. and ſhould not this Court take notice of ſuch injuries and oppreſſions, the Mayor may turn out all at pleaſure: Its like the Caſe of the Sheriffs of Nottingham, Mich. 12. Car. 2. B. R. a Mandamus being awarded to the old ones to deliver over Rolls to the new ones; alſo whither there be cauſe or no, the Court will grant the Writ, though not reſtore without Cauſe: And in the Common Bench the Juſtices by 4 H. 4. have power to turn out at pleaſure; alſo that is an Inferiour Court, and ſo not like the Courts in Weſtminſter. And (Underhills Caſe) a Mandamus was granted to the Borough Court of Southwark to reſtore Attorny; and an Aſſize will not lye of ſuch Office, and ſo the party without remedy. Windham conceived this a new Caſe, and the Preſident not warrantable, and a Mandamus may be as well granted for Scriveners Clerks in London, or Cryer of Inferior Court, which Foſter agreed. Twiſden, this Writ is grounded on Magna Charta, that none ſhall be diſſeiſed of Liberties or Franchiſe, &c. and conceived a Mandamus grantable. So Mallet and Twiſden conceived (96) Attorny.

ed Blagraves Caſe, that Recorder choſen, ad libitum, may be turned out ſo without Cauſe, no Law; but Curia contrà, for the ſame way he is created, he may be diſcharged: But the Court being divided, the Mandamus was denyed.

In Error Br. 148. Molins *againſt* Weldie. Ante.

(97) Error. To ſay that J. S. was no Alderman *Tempore Judicij*, is aſſignable for Error, 3 Cr. 320. pl. 8. but not in Stat. Merchant, for that muſt be avoidable by *Audita Querela* 3 Cr. 319. pl 6. 1 Bulſtr. 207. pl. 223. Godbolt. 239. Siderf. 94. pl. 20.

WIld for the Defendant in the Writ of Error 7 H. 7. 4. that a Judgment was given as before James Duke of Ormond, &c. whereas he was not then preſent, which being as a Judge, is contrà to the Record, as if it ſhould be ſaid that Judgment in Common Bench was not given, 2 Cr. 359. Whiſtler *againſt* Lea, a Court certified held ſecundum conſuet. the Defendant cannot ſay there is no ſuch Cuſtom; and here in nullo eſt Erratum, cannot be pleaded the matter being not proper to be aſſigned for Error, but Demurrer to it, as here, is proper; this was aſſigned as Error of Judgment given in the Marſhalſea in Action on indebitatus on inſimul computaverunt, which the Court agreed; but clearly Treſpaſs, or falſe Impriſonment lyeth: And a ſtranger ſhall not be Eſtopt in Collateral Action of the party himſelf againſt which the Judgment is: And in ſuch Action, if the Defendant Juſtifie by this Judgment, the Plaintiff need not plead nul tiel record, but may plead ſpecially that there was no Judge preſent Judgment Affirmed.

Win *againſt* Lloyd. Ante.

(98) *Scire Facias.*

JOnes for the Defendant in Writ of Error 26 H. 8. 2. is that on Recovery againſt J. S. who makes Feoffment over, Scire Facias muſt be againſt Feoffee, 28 Aſſ. 42 Aſſ. 22. by Fulthorp: The Court agreed there muſt be a Scire Facias, elſe an Aſſize will lye; and for the time many of the Books ſay that it ſhall go after Reverſal, and before Reſtitution: But Dy. 321. the courſe is altered, and on great advice, thought moſt fitting to go before Reverſal, and ſince many preſidents are according, and elſe one would be prevented of remedy by Releaſe of Errors: And here, that there is another Tertenant, is confeſſed by the demurrer, Allen for the Plaintiff agreed Scire Facias; but after in nullo eſt erratum pleaded, and Iſſue thereon, as here, is only Ex Gratia Curiæ to inform them, which is ſufficient by the return of the Sheriff, and no farther Plea may be in delay of Judgment, which the Court agreed, and refuſed to grant farther Scire facias F. Utlary 40. Williams conceived there is no Record in Court the Judg-

pass; and if there be any matter of Law, as in Traverse, it may be induced, and not left to the Jury; and as in Trespass for eating in Soil, he that hath way, and his Horses going here and there Sparsim, its a better Plea then to take Issue Not Guilty. Allen, Should the Plaintiff reply de injuria sua propria, it would not answer the relinquendo sufficient Common, and should the Plaintiff have taken Issue on the leaving sufficient, the same point would have been in Issue, as on Not Guilty pleaded in the Bar. Twisden conceived the Defendant hath Election to plead as here, or take Issue: and by Foster, the Commoner, hath right all over the Common, and therefore he shall have Action against a stranger, but the owner of the Soil digging part, must Justifie specially, as on approvement; and when a Common is for certain number of Beasts in Great Fields, the Grantor cannot improve: And per Curiam, this Bar could not be better. Allen agreed, if the point of Action were for the digging; contrà here where its but for a Consequent Dammage. Adjornatur.

Norfolk *against* Aylmer. In Dett. Fitzh. 80.

Tr. 14 Car. 2. Rot. 278.

IN Debt on Obligation of 200 l. Condition that Ed. Smith, one of the Kings Judges, committed to Serjant at Arms of the House of Commons, should be a true Prisoner unto the Plaintiff, his Executors and Assigns, until discharged by the House of Commons, and shall not go abroad without licence, but shall pay his due Fees; the Defendant pleaded it was for ease, and so void by 23 H. 6. 10. Powis for the Plaintiff 2 Cr. 46. that the Serjant at Arms is not within the Statute, as being Officer superior to those there named, and hath not properly belonging to his Office to keep any Prison, but to attend them; it hath been held contrà to 3 Cr. 66. that the Marshal of this Court is not within that Statute, Latch. 23. Elworly; but the Court held Sir George Reynolds, 9 Co. 98. and common practice, to be contrary, that he is. 1 Cr. 309. Jones *against* Stratford. Levin for the Defendant, that the Bond is void by the Statute; the Preamble, Keepers of Prisons, which he is, when he hath any prisoners committed to him, and the purview according to the Roll of Parliament, is, that all the Officers and Ministers taking such Bonds shall be void, and the Sheriff is superior to the Serjant at Arms, and if he be not within the words, he is within Equity, as 9 H. 6. 19. Pl. Com. 35. Actions on (103) Sheriffs. Dyer 324 pl. 33.

Es-

Escape grounded on the Statute 2 Inst. 382. & 3 Cr. 66. & Dy. 321. it hath been resolved, that this Statute shall be taken by equity against Officers. 2. Its void at Common Law, 1 Inst. 206. the Condition being against Law, being that the Defendant shall be a true Prisoner to the Plaintiff, his Executors and Assigns, which is like condition not to exercise Trade, 2 H. 5. by Hulls, and Owen 143. And also to say, that he shall be a true Prisoner till discharged by the House, as 2 Inst. 52. 1 Cr. 579. Feremans Case and Barkhams Case 507. pl. 59. and Brices Case 593. 70. is ill, but he ought to conclude generally, till he be discharged according to Law, and not to tye him up to any particular way. Also this is a Bond for fees, and so void at Common Law, 2 Inst. 210. Hut. 52. and Lyster *against* Bromely; Also here is no place said where the ffees shall be paid, and so must be to the person; and its not said when, and so they are due every day. Windham conceived it did not extend to Serjant at Arms, and hath been so resolved, because the Statute was only intended of such as were committed for due ffees, and he is only a Messenger and so the Court conceived, but whither it were void at Common Law dubitatur.

Adjornatur.

Found *against* Smith.

(104) Baron & Feme. IN Replevin, the Defendant Avows as Grantee of Rentcharge as Heir of the Baron & Feme, the Grant being to the Feme and her Heirs; to which the Plaintiff demurred. But by Windham, its but surplusage, and one may make himself Heir to twenty, so he appear Heir to the right person, which the rest, Foster absente, agreed.

Taverner *against* Quaterman.

(105) Poor. IN Debt on Obligation to save harmless the Plaintiff and Inhabitants of N. from all charges that may happen, by placing A. or any poor person in Cottage; the Defendant pleads non damnific. The Plaintiff Replyes, they were damnified by placing such a Child in the said House, in being forced to provide necessaries for him, by reason of a Rate set on the Inhabitants by the Major part of the Justices and Overseers. To which the Defendant demurred, as not shewing any of the particular Inhabitants were Tared or Charged, as 2 Cr. 425. & 6 Co. Braughtons Case. But by Windham, its needless; but the possibility that they may, by the Rule made, is a sufficient

ficient Damnification. which the reſt agreed. And. 2. The Overſeers are but by 43 Eliz. But they may provide, and the rate is to be ſet by them, and the Churchwardens afterward, and confirmed by the Juſtices. Adjornatur.

KIrkham moved for Prohibition to the Admiralty, upon refuſal of pleading of the Act of Oblivion in Libel against a Maſter of a Ship, who with his lading bought a Ship taken from him by the Kings Enemies, which the Court refuſed, and left the Defendant to appeal; contrà if they will take on them to expound an Act of Parliament. (106) Admiral.

Davies *againſt* Jones.

THat the Plaintiff being a Broker, the Defendant ſaid he was a Cheating Knave, and cheated him with Braſs Money, Gettings *againſt* Ransford Hut. 13. which Pemberton moved, the words are not Actionable, in Arreſt of Judgment, being of things not in his profeſſion. But, by Windham, where he only ſaid generally of a Tradeſman that he was a Cheating Knave, is Actionable, which the Court agreed; and that the Money ſhall be now intended on Bargain in his profeſſion: But by Twiſden, the not ſaying he did it ſcienter, to be Braſs, is ill, which, by Windham, had been a good exception on Indictment; contrà here, which Mallet agreed: But its not neceſſary, to ſhew where he exerciſeth his Trade, Tuttle *againſt* Milton, Yelverton, which is needleſs. After Verdict, Judgment for the Plaintiff. Niſi. (107) Slander.

Glyn *againſt*, ...

Wedneſday, November 19.

IN Information for Entry on his Land, with force, and expelling him, and Riotous ſetting Dogs on his Cattle, not ſaying ad tunc exiſtens liberum tenementum, which, per Curiam, is needleſs here; becauſe the party can never have Reſtitution: This ſuit being only to puniſh one as Treſpaſſer; contrà in Indictment on 8 H. 6. (108) Treſpaſs.

Couls *against* Calvert. Ante.

Hill. 13 & 14 Car. Rot. 480.

(109) Trespass. TOurner for the Plaintiff conceived the Verdict Aided by the Statute; as Hub. 187. Frestons Case & 76 Banks Case; and that it being good for part, its but a discontinuance to the rest omitted. Allen for the Defendant that the Verdit is void, finding that three did assault, beat, and wound absque tali causa; and that three who Justified, did molliter manus imponere, neither acquitting them, nor finding them Guilty, only of part, be agréed to be Law, Hub. 76. & 187. but not like this Case in Action upon the Case for words in B. R. Verdict found, that he did speak such words, but say nothing of the other, which was held ill; which Twisden remembred. Also its like an Action on Assault and Imprisonment, where some are found Guilty of both, and some Not Guilty of Assault, not saying any thing of the Imprisonment, which is ill. Windham held here was no Issue on the wounding, being only mentioned in the Count, and Replication, but not in the Bar, and so is a discontinuance: But yet the Jury having found for all, and Dammages intire, its ill, which Twisden agréed, and the Court: But though the Verdict be for all, yet they assess Dammages only for the Trespass and Assault, prædict. not saying any thing of the wounding (which though the usual form) yet really nothing more being in Issue then assault, &c. it may be intended the Jury assessed Dammages only for that, though they find All, as in the Count. Adjornatur.

Sheffield *against* Morris.

(110) Judgment. JUdgment on default in Trespass, &c. ought to be Recuperare debeat, and because it was quod Recuperet in Inferior Court, it was reverst for Error.

Southcot

Southcot *against* Ryder. Ante.

IN an Action of account from 1 May. to the 1 August, the Plaintiff is tyed up precisely to the time, and the Defendant having alledged a discharge of the duty accruing before the days, this, per Curiam, is ill, there being no charge as to that in the Declaration. 2. Polyxphen for the Defendant conceived the Count ill, charging him as Receiver, and saith not by whose hands, which per Curiam is needless in Action against Bayly, and so against Receiver, unless there had been demurrer; but contrà here on Verdict and the Plea being before the Act of Oblivion published, could not be otherways, then that he received to pay over to such persons; though in truth those persons were ordered by the Commissioners to receive it: The Court ordered amendment, and to go to new Tryal by consent. (111) Account. Yelvert. 171. pl. 244. Moor. 408. pl. 551.

Bayly *against* Executors of Bayly. Ante.

IN Action upon the Case for not delivering a Cow delivered to the Testator, to redeliver on Request, nor paying the Money for which the Testator sold it. Bigland for the Defendant, though this be a misfeasance, yet wherever one may plead Not Guilty, the Action is gone by the death of the Testator, H. 17. Jac. Rot. 206. Hauthorn *against* Lea, B. R. An Action in terminis, with this a kind of Trover of a Virginal, was by two Judges, on the first motion, held it would not lye against Executors; and per Curiam the Cause of Action began by the Sale, which was a meer Trespass; and by Twisden, this is a meer Trover, and the Plaintiff hath no right to the Money. Judgment stayd. (212) Executors.

Holland *against* Fisher in C.B. Ante.

Thursday, November 20.

BRown after Special Verdict opened put the Case, that G. Lord C. had Issue eight Sons and two Daughters, and by Will deviseth to Brook his Eldest Son for Life, Remainder to his first Son in Tayl, and so to all; Remainder in Tayl general, Remainder to George his second Son, Remainder to the rest of the Sons in General Tayl, Remainder, to Edward his youngest Son in Fée: William had Issue Henry and George and three daughters, whose Issue are living; William dyed, H. enters, and so was seised to him, Remainder (113) Tail.

to his Brother George, they are both attainted, and G. executed, the King for great consideration giveth to Duke Brooke Heir of George and his Heirs, so long as G. or H. or any Heir of them be living, all those Lands which were of Henry or George by devise of G. Lord Cobham, tam amplis modo & forma, as by any means they came to our hands; and further grants the Remainder to Duke and his Heirs for ever. Duke by Fine and Recovery, P. 3 Jac. sells to Preston, under whom the Defendants claim. Afterwards 5 November 3 Jac. its enacted by Parliament, that all the Kings gifts and Sales shall be good, according to the effect of the Grant; all the Brooks are dead except the lessor of the Plaintiff, who claims as heir in Tayl of Henry, and the Purchaser Preston, who married one of the daughters and Coheirs of Duke Brook. The first Question he made on the Grant of the King, which he conceived good, or at least made so by the Act of Parliament, and the Recovery good, and so Judgment ought to be for the Defendant. By this attainder the King hath the Estate Tayl in Henry, and the Remainder in George in Fée determinable upon Henry his dying without Issue, and the Remainder to H. as Heir general of G. Lord Cobham, and the Remainder in Fée as Heir in Remainder: And though the King take no notice what Estate he hath particularly, yet its good, being for valuable consideration, and he intends to pass all: the Objection of that grant by the Kings Tenants in Tayl, Altonwoods Case 1 Co. Reversion in Fée was void, hinders not, because there the King intended to pass a possession, and so he would do a wrong; and he intending to pass it in possession, it shall not pass by fractions. But here is no wrong in the Case at Bar, but the grant shall Enure out of those lawful Estates which the King hath in him, all which though several, he may pass 1 Co. 49. Hussyes Case Where the King hath several Fées, he may grant by fractions, because the Fées are intirely in him; 3 Cr. 519. is all one with the Case at Bar, and these Estates are granted as amply as they came to him: And the King need not recite the particular Estates, having granted Ex certa scientia, as if he have Fée conditional or determinable, 1 Co. 45. 48. and grant absolutely, its good, Dy. 100. Culpepers Case. The Kings was in possession, as here, though the Traytor not executed as here, nor need he recite how it came to him, Tr. 30 Eliz. B. R. the Queen *against* Green, Ed. 6. was seised of the manner of Hackney and Step. valued &c. which he had in Exchange from the Bishop of London, there was 20 Acres of a great Marsh parcel of another Priory; the King granted to the Auncestors of the Lord Cleveland, all the Mannors, &c.

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nec non omnia & singula Mariſca ſua ibidem. Here though there were ſpecial recital, yet all the Lands paſſed, as well the twenty Acres held of another Manner as the reſt. 2. The Suggeſtion or quæ quidem, if falſe, it ſhall make the Grant void; but here is no falſe Suggeſtion, but of the true Eſtates that were in him, 21 Ed. 4. 48 16 Ed. 4. 46. 5 Eliz. Moor 45. and the King himſelf without Suggeſtion takes notice of the Will, and ſo it ſhall be a part of the Grant it ſelf; and referring to the Will its all one, as if the particular Eſtates to the Heirs Females thereon had been expreſſed, though the Will be only averred, and not on Record. 1 Co. 64. So 9 Co. 29. b. Merediths Caſe. And. 3. For the Habendum it will not hurt, Eſpecially if it be granted that the Will is part of the Grant, the Habend. is ſo long as George or Henry or any Heir of William Lord Cobham ſhall live, with reference only to the Will; and ſo when that fails the Grant fails, and thus there is no wrong to the King, or any, but that when the Heirs Males fail the Females may enter 9 Co. 97. So grant of Felons goods after Waifs, Strays; and Manor granted dicto manerio ſpectant. ſhall refer to the Waif to make good the Grant, not to the Manor, to which they cannot appertain; alſo there being here a perfect grant before unto Duke Br. and his Heirs, and ſo the Habend. ſhall rather be void then avoid or perplere the Grant, ſpecially being adeo plene, &c. which often paſſeth things prohibited by Parliament, as Advowſon 10 Co. 64. and elſe the words of the Patent would be void, ſo is 10 Co. 61. Whiſtlers Caſe, and Moor 872. pl. 1214. Hub. 126. want of theſe words adeo integre hindered the Grant, which are here ſupplyed, and no doubt but Tenant in Tayl Remainder to the Father in Tayl, levying Fine, or being attaint, doth forfeit and cut off all, and that the Habend. ſhall be void rather then perplere the Grant is expreſs in 8 Co. 56. Auditor Kings Caſe, for the King may be deceived as well in abridging his intent in Grant as enlarging it, Dy. 77. Harrington *againſt* Pool. 4. This Grant being for valuable conſideration, the Law will ſtrain his words as far as may be, Dy. 100. 8 H. 7. 3. Grant of Liberties with rent reſerved probis Hominib. de D. is good; and its not the Kings Title is here ſet up, but the Heir Male to overthrow his Anceſtors Recovery; therefore the conſideration being ſo long paſſed, and poſſeſſion accordingly, 10 Co. 67. it ſhall be intended true, (nothing being found contrary,) that it was not paid; and this is by way of Reſtitution and ſo moſt favourd. 2. However it be void, yet by the Act of Parliament its made good, being as general and large as any, curing all defects in perſons or grants; and

and if it were a lawful grant, there is no need of the Act 39 H. 6. 30. 38. 29 Ed. 3. 24. Grant. F. 100. which Cases are stronger then this, Dr. Atkins *against* Longvill 2 Jac. C.B. Hub. 230. 2 Cr. 5[illegible]. Mich. 19. Jac. ats *against* Golsford, C.B. The Defendant justified as Servant to the Dean of Winsor. The Plaintiff replyed by grant of Rectory to the said Dean which by 21 Jac. were made good, and the Question on the point of Confirmation, whither this Rectory passed by the words all Advowsons, &c. which being particular, cureth all defects; So in the Case at Bar; contra of general words only. 3. However this Recovery by Duke being at least Tenant of the Freehold, though he come in on the Base fee, is good; as recovery against Discontinuee, as Vouchee, binds all Remainders, contrà to Maynards Opinion, for he cometh in in all his Estates that he ever had; but he shall not bar Estate he never had. Bendloes, Apprise *against* Apprise 25 H. 8. Baron & Feme Tenants in Tayl, he discontinued to his Eldest Son and dyed, his Son coming in as Vouchée (living the Feme) shall not be barred; so Herbert *against* Binnion, Tr. 17. Jac. B. R. Tenant in Tayl Attainted suffers Recovery as Vouchée, and adjudged good; and the Court would not suffer the Attorny General to argue it, this being a Common assurance, of which the Judges ex officio ought to take notice. Barton *against* Bemors Case 37 & 38. Eliz. B. R.

Moor 21. pl. 350.

2. Tyrrel observed the King had four Estates in him by attainder, three qualified, one by Henry, another by George, which became the same in the King, in whom two such Estates cannot consist together; another when the Issues Male should be dead to Henry, so long as he had Heirs Females, &c. and one an absolute fee, limited to Ed., who dying without Issue, discend to William the Eldest Brother, and so to Henry, and so is in the King distinct, by reason it came to him by Act in Law, so 1 Inst. 18. Dy. 150. as on Attainder of Tenant in Tayl (Reversion being in Tayl of his gift) he hath distinct Fees, and the King might have granted all by special recital, 1 Co. 47. yet without it its void 1. For its uncertainty, out of which of the Fees the King intended to grant; but he agreed that if the King have conditional, and grant absolutely, its good; so if the King hath Base fee, and Reversion and grant in fee, its good, 3 Cr. 519. contrà here where there are mean Remainders to support such fee distinct, as 2 R. 2. & Co. 46. contrà in grant of Common person also, 1 Inst. 145. the King, Hub. 229. though he need not recite his Estate, must be truly informed of it; and this grant cannot enure out of the first Estate in possession, no such intent appearing, but being

being dubious, it shall pass as most for the Kings advantage, which is out of the absolute Fée, which here cannot be: Also it cannot be good to pass all the Estate out of him, because his intent appears to pass but one intirely, which would else enure by fractions, and the Patentée be seised for the Life of the person attainted, and so let in all the Remainders again, and as they dye, be revested, which is more then we ever read of: For this Reason the Law abhors perpetuities 1 Co. 84. Corbets Case, & 8 Co. the Princes Case had not been good, had it not been by Parliament; so Sir Rowland Haywards Case, & Borans Case, Moor 496. H. 1. Jac. Yelvert. 46. parcel cannot pass one way, and part another, though there be sufficient words, Hub. 224. Ann Needlers Case; and this intire grant, without apt words could not be made good by recital of his Estates, and the subsequent Clauses of the grant do not make it better, but worse, that quæ quidem being the Suggestion of the party here, contrà where the King is truly and fully informed of this Estate and Title, 6 Co. 55. of which the Patentee hath here failed, telling the King he had an Estate so long as Henry had Issue Male, but saith nothing of the others; when the quæ quidem is in the Body of the Grant, its the Suggestion of the party; so it is here, and so makes the grant void, 29 Ed. 3. 8. being false, 10 Co. 110. 1 Ed. 448. 16 Ed. 4. 7. 8 H. 7. 3. having not fully, as well as truly, informed the King: but when the quæ quidem is in the habendum, its the Kings, but when the falsity is not in a thing material, it doth not avoid the grant, but here its the Ground of it; and though the Lands be particularly recited, and so the quæ quidem is but demonstrandi causa, yet here it is to declare the Kings Title, of which he was not before informed, and so no Estate passeth to Duke for the Life of Henry, and so long as he hath Issue Male, no such being in the King, for the Estates of H. & G. meeting in the King without Remainder, are both consolidate, and become one in the King, so long as they, or Issue Male Joyntly live; and should the King pass a base Fée to Duke, so long as H. & G. had Issue, he would retein another base Fée, so long as W. had Issue, which cannot be where he hath but a Base Fée, contrà if one were an absolute Fée, and the surviving of one to the other is but a possibility, which the King never intended to Grant; and the quæ quidem shall never enure to pass an Estate out of the King, where the rest may receive prejudice, 16 Ed. 47. and Legats Case 10 Co. 15. the words prout apparet in the Will being part of the words of the Patentée, will not help the matter, being in general words, none informing his Title by the death of

2 Brownl. 51. pl. 68.

of Edward or George: Also that Clause Habend. adeo plene & integre, &c. adds nothing to the Estate granted in the other Clauses, but only to the particular lands, 2 H. 6. 20. F.N. B. 31. and the County of Salops Case, are not like this, which leaveth the passing of the Estates as before; nor is it like refeoffment adeo plene, as H. is in feoffit, 1 Inst. 9. nor like passing Advowson 19 Eliz. Dy. & 10 Co. 65. as appertinent. adeo plene; and had these words been absolute and alone, they might have passed all his Estates; contrà where it depends on former grant, as here, in which Case the Grant would be void and useless; and that the grant is ex certa scientia, 1 Co. 45. is favourably expounded for the Patentee, with respect to the Estate expressed, Pl. Com. 333. but is of no validity where the Suggestion is false, or the King deceived. But the grant in this Case is ex humili petitione, and so could not be ex certa scientia, or mero motu, and yet the Grant and Habend being contrà, shew the King is deceived. Again, the grant of all such Reversion and Reversions pass nothing of the Qualified Fees, which were not so in the King, but as Remainder; but admitting an Estate to Duke passeth in the grant, the Habend. is not contrary, but as large as the other, though in another manner: So Lands given to H. and his Heirs, 30 Ass. 47. 35 Ass. 14. 8 Co. 154. 2 Cr. 476. 1 Inst. 21. the Habend. to H. and the Heirs of his Body, is good, especially if Remainder be limited over; so here, Had it been to D. and his Heirs, so long as H. and G. had Issue of their Bodies, this had been good; but yet here its void, shewing that he intended to make one Fee intirely contrà to the premises, but yet it may expound the meaning of the Grantor, Hub. 170. 2 Co. Bucklyes Case 1 Cr. 155. Gossack, and cannot make the premises void, unless on grant to A. Habend. to A. and his Heirs, there if Habend. be void, the Grant is so, and should the reference to the Will be to all the Issue of William Lord C. it would be void, because the King had nothing to do with the Estate of the rest of the Sons; also the Grant to D. and his Heirs make the Fee, and the saying so long as H. and G. or either of them have Issues Male, is but the limitation, 5. Co. Swails Case and so implyes the whole time, 1 Inst. 1. b. 10. Co. 97. Pl. Com. 57. Walsingams Case, else is the Habend contrà to the premises, and so void, Dy. 56. as grant to H. and his Heirs, 5 6 Co. 8. Habend. to H. and his assigns, the Habend is void, Hub. 171. 3 Co. 9. 2 Co. 32. being a several Clause; otherways if it had been but one intire Sentence, as grant to J. S. and his Heirs, for the Life of J. S. is good;

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contrà of grant to J. S. and his Heirs Habend. for the Life of J. S. 3. This is not made good by the Act, the Jury finds a Parliament began 5 No. 3 Jac. whereas that was the second Sessions, and it began 29 Sep. 2. Jac. Pl. Com. 84. in which Case in Plea, as 2 Cr. 111. pl. 9. its certainly void, and so be conceived, here the Jury having found Si super totam materiam, &c. Special Verdict must find all things of substance certain, being that all things therein are supposed to be done by Counsel, as this, 5 Co. 97. Hub. 262. the Judges must Judge on the Juries doubt, if it be on special points, as here, 1 Leond. 306. but had the Act been well found, it would not make the Recovery good, being words of the future Tense, that the Kings grants shall be good, which shall not make good by retrospect the Recovery suffered before; 4 H. 7. 10. per Vavisor; but I relye rather, that void mean Acts, as this Recovery, shall not be made good by this relation of the Act to the first grant, so Butler *against* Baker, no more then it should make good an act tortious; and if it should, here would be a double relation to the Grant, and to other Sales, but principally the Act, whither of Confirmation or new Constitution, doth refer only to the first Grant 3 Co. 74, not the Patent, as 31 H. 8. cap. 13. 1 Ed. 6. cap. 8. 34 H. 8. cap. 21. 4 Ph. Mar. cap. 1. 43 Eliz. cap. 1. 35 Eliz. cap. 3. in which Case it confirms all Acts thereon done, but this leaveth the Grant as it found it; and this appeareth rather to be the meaning here, Hub. 231. by the saving to all persons in the Act such right, &c. as before, not like 2 Inst. 675. for here the Recovery was void, as well as the Grant, and so the Act shall not make both good by Relation, which is but for necessity; and in 28 H. 8. cap. Altonwoods Case, the saving was general of all Lands, though the Act be special: Here its a special saving in general Act of all the Lands of either of them. As to the Plaintiffs right of Entry its not good against the King, by 26 Ed. 3. or 2 Ed. 6. the King being intitled by double matter of Record, though he may Traverse, or have monstrans de droit, especially there being yet an Estate, so long as the Daughters of William have Issue in the King, so is 29 Ass. 31. 4 Co. 55. Dy. 139. 324. but yet if the Act of 3 Jac. be good, that saves such right, &c. and so the Entry would be good. As to the Consideration, it doth not appear whither the Money were paid or no,, and if it were not, its a void Patent, 10 Co. 67. 5 Co. 92. and if the payment be past, the Jury need not find it, contrà where the payment is to be at future days, Patents Br. 4. Hub. 222. 231. Pl. Com. 455. 21 Ed. 4. 48. and in all Cases before, the Court can Judge cer-

tainly, Pl. Com. 84. (notwithstanding 2 Cr. 144. 64.) in Verdict as to the Writ, Count, and pleading must appear 9 Co. 74. 4 Ed. 3. 15. and shall not be ayded by intendment; and so the Verdict being void, no Judgment can be for the Plaintiff; But as to the matter of Law, he concluded for the Plaintiff.

In C. B. Saturday November 22.

HYde conceived Judgment ought to be for the Defendant, and in all agreed with Brown, holding this a good Grant
(83) by the King, and that nothing remains in him after it, but Duke hath the whole Estate in him, Henry being at the time of his Attainder seised to himself in Tayl, Remainder to him in general Tayl, Remainder to him in Fée, both the Estates Tayl being vested in Henry as Heir, and Heir Male of William Lord Cobham, and George having no Issue female, he had also the Remainder in Fée, and 1 Co. 45. 8 Co. 56. 176. 10 Co. 67. 11 Co. 11. put this for a Rule in Construction of Patents, that when they may be taken good in one sense, and void in another, for the honour of the King, and benefit of the Subject, it shall be taken as good, on which Rule I found my Judgment; and if by any reasonable Construction, not contrary to the Rules of Law, we may maintain the Kings grants, we ought to do it, by reason of the late nice Interpretations that have been made thereon, to subvert the Kings intent: And it appears here is sufficient certainty of the Estate the King intends to grant, without passing it by fractions, for the King hath a limited or Conditional Fée, which he may grant absolutely, Lit. Sect. 11. 1 Inst. 18. the one being as great an Estate as the other, though not in so ample manner; and had the Case rested in the Limitation to Duke, so long as Henry had any Issue of his Body, or such Issue had an Issue, it had been good: and there as to the residue the King, recites the Estates of Henry and G. and how they came by this Estate, viz. by the will of G. Lord Cobham, and for the particulars, referreth to the Will, and after grants to Duke adeo libere & plene, &c. by which particular recital it appears, the King was not misconusant of his Estates and Title, and so not deceived in his grant: And though the Estates were several in H. and George, as different persons, yet in the King they are consolidate, as they may stand together, the Estate Tayl of L. Cob. and Remainder in G. are coupled intirely, as one in the King, and their Remainders in general Tayl are joyned in expectancy after the particular Estates in George, as Hussyes Case, and so the Remainder in Fée in him apart, not all clapt together as one Fee; and hereby the best

best exposition may be made to support the Kings Grant, and to make the Estate of Duke to operate according to the Estates vested in the King; and the Patentee may as well hold as the King, so Duke shall have it during Issue Male of Henry, &c. and then to the younger Sons, and in Remainder to Duke, and so the King doth not grant a greater Estate then he hath; nor can the Estate be said to be in esse, and not in esse, because it continueth as long as each Estate doth continue, and the first Estate in the King, so long as Henry had Issue, might have continued for ever, and so no unreasonable construction to pass first, and then Remainder as limitted to younger Children of George L.C. especially the King taking notice of each distinct Estate in him, and the Remainder; and this Construction shall be the rather, because the Grant is Ex certa Scientia & mero motu, 6 Co. 56. Chandois Case, on which words the King doth not rest, but declaring in the quæ quidem how he hath the Lands in his hands, ex uberiori gratia, doth de novo grant it adeo plene libere & integre, which are always so by themselves (and not in the premises of a general Patent) to declare a genuine effect in Grants according to the Kings intent, and they would be useless, should they have other construction; and hereby the Absurdities mentioned in Altonwoods Case are avoided, and the Rules kept: For the Patentee hath not only an Estate during the Kings life, but a qualified Fee, which may by possibility endure for ever: But here is a Remainder intervening after this, before the absolute Fee commenceth, of which the King takes special notice, and so grants no more than he lawfully may, and the Remainder to the younger Sons are not hereby discontinued or displaced: And it's no violent construction to say the Patentee by this Grant shall have such Estates as were in Henry and George, 8 Co. 77. and other construction would be to the dishonour of the King, and disherison of the Subject, to frustrate the Grant under the Great Seal by nice constructions. 2. The Habendum alters not the Case, but well serveth the premises; and so the Case is, that the King having a qualified Fee so long as H. and G. have Issue, Remainder to Duke, Remainder to the younger Sons of the Lord Cobham, grants to D. and his Heirs, habendum so long as any Issue of H. or G. have Issue, which is as good as if he had granted absolute Fee, and better; for it appears the King intended not to grant one intire Estate by this several Habendum, but such as he had, and no greater; for he had their Estates in special, with Remainder in general tail, which will well warrant this Grant, referring to the Will whereby they had Estates in spe-

cial tail, Remainder in general tail, Pl. Com. 154. and the rather, because else it would be void, and because hereby no wrong is done to any; for the three Daughters of William cannot pretend right, because by his death both the Estates of William, as Male and Heir general, were in H. and so is forfeited by Attainder, and their Estate was but contingent that Henry had died before Attainder without Issue, so by fine of the eldest Son of A. to whom Estate is limitted in special, Remainder in general tail, all the mean Remainder is barr'd, because the younger Children must claim by him; and though the Habendum be void, yet the Patent shall not be so, having premises sufficient to pass the Estate, as Pl. Com. 152. and Auditor Kings Case: As to the Verdict, not finding the consideration paid, being to be made at future days Patents, Br. 4. 100. 5 Co. 94. and if not made, make the Grant of the King voidable, 1 Cr. 548. Swift *against* Ayre; but no Books say that the Grant is void, but that the Lands are in the Patentee till failure of payment, and the failure must be found by matter of Record, as breach of Condition subsequent before the King be intitled, 14 H. 8. 32. Pl. Com. 82. the Non-payment going only in defeasance of the Estate: Also hereby though the King might have right, yet that is nothing to the Plaintiffs coming in as Remainder-man, at least not till the King hath avoided the Estate; also no Book requires the payment as necessary to be found in Special Verdict, but the contrary is presumed, 5 Co. 97. Mich. 24 Car. 1. Denham *against* Baker, B. R. devise to J. S. paying Debts and Legacies, the Jury find the devise, and not the payment, which being a Special Verdict, was held good, and shall be intended; so were the Cases of Sherman *against* Johnson, Trin. 1657. B. R. and 3 Cr. 387. Also the quæ quidem being the Suggestion of the Patentee generally, when false shall avoid the Grant, 10 Co. 110. But here it's not the Suggestion of the party, but its added by the King after the Consideration and Grant to declare a more full declaration, that those Lands he intended to pass came thus and thus, and is warily penned, and by Learned Counsel also it's all true: And so were it the Suggestion of the party, it's all one; and though it be not full, yet it's only surplusage, and no part of the consideration or inducement to the Grant, nor of the Grant it self, and so shall not avoid the Grant that is sufficient to pass all the Estate without any recital: But here it is full enough, reciting all the Estates the King hath, and also taketh notice of other Remainders limited by the Will, and therefore referreth to it, 10 Co. 62. which yet needs not be expressed, or on Record:

And

And the King may as well take notice of this Will here, as in the premises and Habendum of the Grant, and so it is as parcel of the Grant. Hence followeth, 4. the Act of Parliament, which, had the Grant been void, had made it good, and the Verdict binding, the Parliament begun the second of Jac. which really was but the second Session, which mistake was partly grounded on the printed Statute, partly on the default of the Clerks who drew not the Act right, the Notes being to find the Act 3 Jac. prout, by which the mistake of the Clerk may be amended, 3 Cr. 149, 677. especially here being an Agreement that any thing omitted shall be amended according to truth: But an express Verdict finding the Act prout it was made, and being drawn up otherways, is amendable. 5. By this it appears the actual possession of the Estates of the persons Attainted was in the King; and the Act enables all Grants of the King made to Duke, 11 Co. 69. whereby they intend to make good what was before defective, not that they should be good according to a strict sense of Law, but according to the true effect and meaning of the Letters Patents. Also the ends of the Act are, 1. to vest all the Lands of H. and G. in the King; and 2. to strengthen the Estates of Purchasers who had bought before it, which would be frustrated should it not be thus expounded, Pl. Com. 538. Again, as to the Title of the Plaintiff, he cannot enter though the Patent and Act be void, but he is yet barr'd by the Recovery, so that he hath no right: And so the Case is, Duke bargains and sells to Prescot and his Heirs, so long as any Issue male of William shall be living, the Remainder in fee to P. and his Heirs, and after suffers Recovery as Vouchee unto Prescot; for here is a good Tenant of the Præcipe, and no Estate in the King, and that Recompence being on base fee, cannot go unto the other Remainder, is no reason to avoid it; for 8 Co. 77. this is not the sole reason of the barring Reversions, for it is also a common Assurance not to be defeated by such fictions as Gennings Case, and Blunket *against* Holms, and because it bars the Estate tail it's consequential, 2 Co. 74. that it bars the Remainders.

4. Bridgman Chief Justice, observed that the Lease is expired, and the Lessor of the Plaintiff John Brook is dead without Issue, but yet in regard of the consequence, he argued that Judgment ought to be for the Plaintiff. And 1. contrà to Tirrel, and admittance of the others, that the Entry of the Plaintiff, had he right, might be on the King without Office wherein the Case is, but only H. is Tenant in tail, Remainder to John Lessor of the Plaintiff, found by Office, and then died

died without Issue, the Office is gone; and 15 Eliz. Sir William Say's Case, the Earl of Northumberlands Case, 3 Ed. 4. 25. him in Remainder may enter. Also this is only an Office by Commission out of the Exchequer, 5 Co. Pages Case 52. which is only Information, Moor, Legers Case in Englefields, no double matter of Record, unless the Office be particular out of the Chancery. Also 2. the not finding payment is no cause of Ven fac. de novo; for if the Patent be naught, and the Plaintiff have Title without it, it needs not, also the Patent is only voidable by Non-payment clearly, 21 Ed. 4. 48. So Grant quod relaxavit before Mich. or ad solvend. faciendum, do only avoid the Patent by Office found, and this is collateral to the matter in question, and it shall be rather intended paid, Villers Case, Mich. 14 Car. C. B. Lease to Villers paying such Rents, the Jury find it accordingly, and it was held a Condition; and though nothing was found paid, yet the point being, whether it were Condition or no, it was held a Condition without other doubting. He agreed that the want of recital in the quæ quidem doth not avoid the Grant, yet is the information of the party: Also the first Habendum is void, because it's quam diu H. and G. have Issues of their Bodies, and not so long as they have Heirs males, &c. and so that shall avoid the Grant: Also the common Recovery shall not be confirmed by the Act, though without question of it self it shall barr all subsequent Remainders, though he be in the Post of another Estate, so are most Vouchees, Parker *against* Ingram, the coming in in privity only of Estate or right he might have by possibility, doth bar it. As to the main point, he conceived nothing in the premises to make the Patent void but the Habendum, for Henry being Tenant in tail, Remainder to him as Heir of the Body of William, Remainder in fee by death of Edward and George Tenant in tail in Remainder, the King by Attainder had only the Estate of Henry immediate interposed with several Remainders, though revera, the Estates of G. and Henry were but one in the King, yet grants Habendum omnia præmissa to Duke and his Heirs, so long as Henry, or any Issue of him or G. or any Issue of such Issue, inheritable by the Will should live; and also Habendum such Reversion and Reversions adeo plene, &c. these are two, and all the Habendums: And the quæ quidem, though surplusage and suggestion of the party, if false, it would make the Patent void; before it was much controverted in Legates Case, whether these clauses, being only demonstrandi causa, were the suggestion of the party. And Popham held to his last the grant of such Lands as

Pl. Com. 485. b. Nicholls Case.

Yelvert. 54. pl. 77.

as the King had by Attainder of J. S. being intire, if any part were void all was so, Mason *against* Chambers Case; contrà if only in the quæ quidem, which was then held the King's Declaration: Also there is no Judgment now that the quæ quidem before, more then after the Habendum, should make the Grant void, being false: But I conceive in either Case, if it be any part of the Consideration, it will make the Grant void, as Legats Case; or if thereby the King be deceived in his Title, or other persons may have prejudice, and the King could not know by the Office that H. was seised in general tail with Remainder, but only by the Information of the party: And in Chandois Case there is only quæ quidem, &c. once, 6 Co. 55. b. and then concludes virtute cujus the King was seised; but here is no misrecital, but it's not full, yet good, and though too short a Recital may make the Grant void, as here, had only this quæ quidam only recited the Kings Estates; but the King taking notice of them in other parts of the Deed, it's good enough. He agreed the Reference to the Will to be as well as if the Will were in terminis, but all doth not tell the King his whole Estate, viz. that William had Daughters, that Edward is dead without issue; and therefore the King being deceived in part, it's all one whether in Estate or Lands: Also no other Estates can pass than are recited in the quæ quidem, and the Grant of other Remainders shall, as Mildmayes Case, be intended of another nature, and not to the King himself; but the King taking particular notice of all his other Estates, this recital hurts not, 1 H. 7. 13. 1 Co. 49. and though the King need not recite any thing, yet if he recite part, as that J. S. is Sheriff, and so pardon omnia debita, this shall extend to no more than is recited, so as if the recital doth mislead or restrain the King, it may be void. And as to the main point, though I may believe in my private Judgment, that all the Estates in the King pass, yet not Judicially, for this is all one with Altonwoods Case, as to the honour of the King, which must be looked on as not to be deceived by the parties mis-information: And ex certa scientia & mero motu, are words of Clerks of course now, and the King's Attorney inserts them without any special Warrant. The last Estate and Habendum was the absolute Fee which came to H. by the death of Edward, which is specially passed, and no other were forfeited but this; he forfeited Estates tail which were Fee-simples in the King, but no other Estate in Fee. Also the King had the Estates of H. and his Issue male, and G. which in him are but one; for the Law without cause will not make two Fees, as at Common Law, 15 Ed. 4. Villain

lain Tenant in tail, Lord enters, he hath Fée so long as William hath Issue, and the Donor hath another Fée; but where the Donor cometh to be Lord, both Fées are one: But Henry also forfeited the Estate he had to himself, and to the Heirs of the Body of William, which is in the King distinct, to take effect after several mean Remainders; and then the King granting to Duke, habendum so long as Henry, &c. shall be in being, doth pass, neither all nor any part of any of the Estates forfeited (but the Fée-simple passeth by the other habendum) but this is too much to pass one Estate, viz. to the Heirs, but too little to pass that to the Issues male of the body of Wil.

Hub. 323. The King cannot have two several Fees in the same thing.

It must be agréed, that when the King hath several Fées, as here, he may sever them in his Grants: But though the King have one Fée, and out of it limit base Fée to J. S. so long as A. hath Issue male, no Remainder can be limited; but the difference is when the Estates are created as thus by Act of the party, 10 Co. Seymors Case, and when by act of Law, as in the Case at Barr, for these being extracted out of Estates tail are several, and not consolidate in the King, as the Estates of Henry and George were, but may be granted severally; and by the second habendum with the Fée, all agreed it passeth, so that must be laid aside: And the only Question ariseth on the first habendum to Duke and his Heirs, so long as Henry and G. had Issue of their Bodies, which doth not pass the whole Estate of the King, that being the Judicial intent on the Patent expressed, and the King doth not grant so long as William hath Issue of his body, and so parts not with that Estate the King had, so long as any of the three Daughters have Issue, and it must take effect out of two Estates, or not at all, viz. the Estate determinable on default of Issue male, nor out of the Estate that H. had, and the Heirs of William; out of the first it cannot, not being sufficient; out of both it cannot, for then it leaveth part behind, and the Estates are several in the King, and he intended to pass but one, and passing two, he is deceived; so he intended to grant but one intire Estate, continuing so long as Henry or G. have Issue; and such Estate cannot pass here but by fractions, viz. the Patentee takes whilst Henry or G. have Issue male, then the King takes so long as William hath Issue, then the Patentée the fée, and the saying so long, the words imply one continued Estate, as Black acre grant to A. so long as B. suffereth J. S. to enjoy White acre, when B. hinders, it ceaseth, and can never revive; so grant to A. and his Heirs, so long as B. hath Heirs of his Body, B. dyeth, the Estate ceaseth, and Pool *against* Needham, Yelvert. 149. it shall not revive by Post-

natus

natus of Feme then inſeint. So here alſo, this Habendum is a prejudice to thoſe in Remainder, if it ſhould be good, for on failure of Iſſue Male in H. and G. John Lord C. leſſor of the Plaintiff cometh in, being the next Male line, and ſo come before the General Heirs of the Body: And the Patent is ſo long as H. or G. have Iſſue generally; and though John might enter, yet he cannot have Action, for the Tenant would pray Aid, and ſo he ſhould be put to the great delay of ſearch: And the King by dedi here warrants the Eſtate to the Patentée, which though it bind not the King, is Ground of Aid; and this is the Reaſon that if the King, Tenant for life, granteth Fée, this is void, becauſe here is colour by this Patent, which is wrong to a third perſon, and he grant more then legally he could do. And this is the Caſe in queſtion; for the King hath a Baſe Fée, ſo long as J. S. hath Iſſue Male of his Body, and he grant ſo long as J. S. hath Iſſue of his Body, this is void, and the King deceived, taking on him to grant a greater Eſtate then he had; and the reaſon why his Eſtate cannot enure by fractions is in Englefields Caſe, Leaſe for 40 years by Tenant for Life, but had that been be in 100 years, or 99. years, it had been Void, which yet is no tort, otherwiſe in Altonwoods Caſe, ſhould the Grant for Tayl to J. S. by the King Tenant in Tayl, Remainder in Fée; and in Chandois Caſe leſs paſſed then the King intended, but he intended to paſs poſſeſſion, and yet a Reverſion paſſed, 6 Co. 56. but if more had paſſed then the King intended, it had been void: But had the Caſe been of grant of Reverſions to J. S. of Tenancy in Tayl in A. that's void. All theſe Eſtates paſs without fractions, contrà here in the Caſe at Bar; the Eſtate may be granted by fractions by one Habendum, had it been generally to Duke, and his Heirs, for that conſiſts with what he hath; but contrà now he hath ſpecified what Eſtate he granted, 1 Co. 49. 3 Cr. 519. Alſo he need not recited his Eſtates, nor ſhall there be any fractions in the Kings grant; but here, out of thoſe Eſtates which the King paſſeth, there are fractions, which makes the difference; for the King would have kept the Eſtate ſo long as William hath Daughters, and ſo the reſtraint is not by operation of Law, but in the very grant it ſelf, though this might have been good againſt a common perſon, againſt whom it ſhall be taken ſtrongeſt, yet not here, where the ſtrongeſt ſhall be as moſt agreeable to the Kings intent, Yelverton 47, 48. and the Analogy of this is as near Altonwoods Caſe as may be, the King being there Conuſant of his Eſtate, and recited it, yet the Ground was the Eſtate of the Kings, Hub. 224.

would not bear such grant: Also because the King erred in the manner and form of his Estate, 6 Co. 56. intending that intire which could not pass but by fractions; both which reasons are full to this Case. And though there it was urged it would be a tort, and not here, because the King hath a base Fee, which may last for ever: Yet here is no livery, and so the reason of tort is out of the Case, enuring only as all Patents by way of Grant, 1 Co. 50. b. Also the King could not grant an intire Estate in possession continuing, and therefore it shall not be good by fractions, which the King intended not, for he had no such Estate as he granted, and he shall not pass part in possession, and part in Reversion, which must be, if this Patent be good; also being not good to all, it shall not extend to be good, so long as H. and George have Issue Male: For the King intended one, and it shall not be good for the rest. Also were the Habendum void, and the Grant sufficient, yet it would make nothing for the Defendant, because the second Habendum going to the absolute Fee is sufficient; Pasmore *against* Proud cited in Lofields Case 10 Co. 107. if the King had granted to A. and his Heirs, Habendum the Reversion which the King hath by Attainder of J. S. to A. and his Heirs, its good; but though this Habendum be void it shall controll the premises, and make the Grant void, which is the difference betwixt the King and common person, which answers Auditor Kings Case; Lands granted to J. S. and his Heirs, Habendum to him and his Heirs, so long as A. hath Issue Male, is good by Common person; contrà of Habendum for Life of A. Yet I doubt, grant by the King to H. and his Heirs, Habendum during the Life of J. S. is good enough; but by the same reason the Habendum is void in Case of the King, the Grant is so, for thereby it appears the King is deceived; and by this Habendum the King hath limited the Estate to D. and his Heirs only in this form and manner, which he could not do, 1 Inst. 21. contrà to Althans Case, 8 Co. 154. Lands given to A. and his Heirs, Habendum to A. and his Heirs Males, its but an Estate Tayl, which shews the gift to one and his Heirs not to be so certain, but that its qualified by the Habendum, 7 Ed. 3. 10. and where the general and special words agree, the limitation shall go according to the special words, and the Adeo plene makes nothing to the Quantity or Quality of the Estate granted, but passeth things as in Case of a common person, cum pertinentijs, as grant to A. adeo plene as J. S. hath it, who hath Fee, yet A. hath not so thereby: As to the grant to Duke, so long as H. hath Issue, its good enough, i. e. till Issue

Moor 476. pl. 1227. 14 H. 8. 14 per Pollard.

Godbolt. 272. pl. 38.

Issue fail, as long as tree grows, natis natorum & qui nascentur ab illis, not only to the Issue, viz. Children of H. and George: And were it so, yet Issue of Issue is general, and comprehends all. 6. As to the Act of Confirmation, it will not better the Patent, for the saving to all persons doth include the Lessor of the Plaintiff, and such mean Remainders, and their rights of Entry, and Remainder, which had it been gone, would have restored it to them; and that all Sales are made good according to the Letters Patents: doth not touch the Remainder, nor was it taken away by the Recovery, which was of another, and void Estate: Also another saving is to all persons as before the Attainder. Also were there no saving, the Act only helps the want of power of the King to grant, not any defects in the Patent. I was never satisfied with Lord Leycesters Case, and the rather oppose it, as not argued at the Bench, and so might fall off on the pleading; the difference is where there is no Entity, which is confirmed as the Customs of D. there being none, its void; or where the King grants Lands of J. S. in Fee to begin in futuro, its not made good by Confirmation of Parliament; contrà on general grant of Lands of J. S. 38 H. 6. 33. Abbess of Syons Case which the King hath no power to make. Tyrrel agreed the Verdict Amendable, and that here was no double matter of Record, and that the finding payment is needless, the Plaintiff having Title without it, and Adjornatur, the Court being divided.

In B. R. Turner *against* Wood. Ante.

Monday, November 24.

Wild the Kings Serjeant, prayed Judgment for the Plaintiff in Debt, on 5 Eliz. because a Barber is a Trade within 5 Eliz. and though 32 H. 8. C. 42. it may be soon acquired, its of great concernment, and it cannot be intended private, though it be not said a Common Barber, its said contrà formam Statuti, and that he did unlawfully use, erect and exercise. Jones conceived it only an Occupation, as Gardiner, and not within the Statute, which intended only to remedy in such Trades that do immediately relate to the publick welfare, as clothing, dyet, &c. So that's not here, though it be an Addition within the Statute 2 H. 5. yet is not within 5 Eliz. 2. Its not said he was a Common Barber, Old Entries. 1. as 8 Co. Wagoners Case is expressly: And Twisden remembers the Case of a Reader or Thatcher of Norwich, was ruled not within (115) Trades.

the Statute; so of a Porter; and it must be said he commonly used it, as Taylor of Ipswichs Case; so of Brewer or Chandler. But by Windham, after Verdict this will be intended, and being a usual Trade, it's fitting they should be included, which Mallet agréed. But Colliers or Plowmen, though Offices of skill and use, are not within the Statute; so of Perriwig-maker. Adjornatur. 422. pl. 143.

Corls *against* Calvert. Ante.

(116) Trespass. TOurner searched the Record of Hub. 187. where the Replication was as here, Co. Entries 643. Withers *against* Ainsly. Jones for the Plaintiff, That the Verdict is erronious, having found the Assault and Wounding as the Plaintiff alledged, and assessed damages occasione transgr. & insult. prædict, which is the usual Entry, and comprehends the whole, especially when they have expresly before found that he wounded, &c. And in Hob. 187. the Question was only, whether the Plea (not whether the Verdict) be good, as here. Windham was for affirming Judgment notwithstanding, because it's agréed by all, that no Issue is as to the Wounding, the Defendant having pleaded nothing to it: But the Issue is on the cause of the Defendants justification, and so the Verdict is proper, that absq; aliqua causa, they did beat and wound, &c. But the Court will apply the assessing damages only to the Issue, and will not intend more. Twisden contrà; That it's Error; for a Demurrer should have been to the Bar for omission of the Wounding, which is a discontinuance: But then replying that he beat and wounded de injuria sua propria, and hereon Issue; which if the Verdict had distinguisht them, it had bèen good; but having given damages for Assault and Wounding, ratione insult. & transgr. prædict. its presumable the Jury were lead on by this Issue to find the Wounding, or else the Jury may be attainted if they give 1000 l. damages, which for Assault is unreasonable; contrà if they assess it for the Wounding, which Mallet and Foster agréed. Judgment reverst. And per Curiam the Issue being ill, and Judgment given, no Venire facias can be de novo.

Nicholas

Cond. Br. 129. Nicholas *against* Pullen. Ante.

JOnes, for the Plaintiff, conceived it negative pregnant, as 2 Cr. 559. Lea; in debt on Bond, if H. followeth the words, and plead performance of all Covenants contained; but when there is a particular Covenant, there must be such a particular Plea as the Plaintiff may take Issue on, or answer to; and this is shewed as Special cause of demurrer. Powis for the Defendant, That the Barr is pursuant to the Count, 12 H. 8. 6. & 7. and lying not only in the knowledge of the Defendant, but that the Plaintiff may as well have knowledge of it, 2 R. 3. 17. 5 H. 7. 8. a. 9 Ed. 4. 15. it may be generally pleaded, Dyer 279. Twisden conceived, That on affirmative Covenants general pleading performance is sufficient, and so on negative; for its sufficient for the Defendant to plead an excuse, and the Plaintiff must assign Breach to intitle himself. Windham ad idem, Negative Covenants may enwrap many particulars, as to say He did not cut down any Timber, unless for the making of Barrs and Stiles, &c. which Foster agreed; contrà by Mallet; but Judgment for the Defendant, Nisi. (117) Covenant.

Playes Case.

NEwdigate prayed a Prohibition to the Admiralty, who had sent out Process to the Plaintiff to appear and account for Prize-goods upon Oath, which are pardoned by the Act of Oblivion by pretence of subsequent Act, which giveth them general Jurisdiction without any time certain. But the Court refused to award Prohibition till they have judged contrà to Law, or taken on them to expound those Acts. (118) Admiral.

In Continuance, Fitzh. 16. Dove *against* Darkin. Ante.

Mich. 13 Car. 2. Rot. 239.

STroud for the Plaintiff, in the Writ of Error, conceived this Court cannot Reverse their own Judgment, sed non allocatur, for its Error in fact. 2. Here is no proper persons in this Suit, because till Error found, none know who shall be party thereto; 40 Ed. 3. 13. 41 Ed. 3. 1. b. for should the party be found alive, then Scire facias against Executor would be ill; contrà if he be dead, Rast. Entries 107. And so the Issue is well enough joyned by the Attorney. It is generally true, that (119) Error. Moor 186. pl. 332.

that when H. alledged that the party to the first Action was dead, there must be Scire facias against Executors, but not here, where the party himself as it were pleads this Plea, as here; and had the Executors come in and pleaded this Plea, and it had been found he was alive on the like Issue as here, that the Plaintiff died before Judgment, this had been a discontinuance; and the Writ of Error is only a Commission to inform the Court, and now it appears the Plaintiff was dead. Windham held the Judgment ought to be reverst, and to say there is no party, is to judge by event, and the Court could do no other than accept this Plea; and there is no difference betwixt a Plea puis dar' continuans, and here in Error, because the party for whom he pleads being found dead, the Attorney could not plead; and the saying that the Defendant per Attornatum venit, 48 E. 3. is well enough after Verdict; but it had been more formal to say such a one pro Magistro, &c. which Twisden and Mallet agreed; contrà by Foster, that the Writ of Error is only discontinued, because by legal Plea it doth not appear the party is dead. 2. Allen suggested that now, before the Reversal of Judgment be pronounced, that Scire facias against Executors may go, which the Court refused being after Verdict, and the Errors assigned on the Roll upon Motion in Court, upon Affidavit no Executors or Administrators could be found. Judgment Reverst.

(120) Executors. QUære if Executors after ne unque Executors pleaded, may give in Evidence that the party is living. Wild, Recorder of London, conceived they may; but the Court doubted.

In Departure, Br. 15. House *against* Launder.

(121) Arbitrement. IN Debt on Obligation to perform Award; the Defendant pleaded nul Award: The Plaintiff sets it forth, being for payment of money at a future day, and that then general Releases shall be made. The Defendant shewed, that after the Submission (which was of all Differences to the time of the Award) and before the day of payment a special matter and cause of Action arose, and so the Arbitrement void. To which the Plaintiff demurred, because here it appears not but that there is only one cause of Action, viz. the Payment and mutual Releases, and so good; contrà where it appears there are other causes. 2. This is a Departure to shew an intervening cause after nullum fecerunt arbitrium generally pleaded in bar. 3. The cause alledged is not sufficient, being speaking of words

Rules against Witherly, Tr. 15 Car. 1. Rot. 604. adjudged accordingly B. R.

words of a Merchant without any Colloquium of his Trade, That he was a cheating Rogue, and cheated all the Country. Windham conceived it a departure, and that after nul Award pleaded, H. cannot maintain it by being void in Law, so Gubbins *against* Clerk. Foster and Twisden doubted. 2. They conceived the words not actionable, nor H. cannot libel for it in Ecclesiastical Court: But being colour of difference, they doubted the Arbitrement void. Adjornatur, and after compounded.

Lawson *against* Witherington. Ante.

JOnes for the Plaintiff, That the Defendant ought to give warning, the Condition being in his favour, and no person certain who should give warning; but after 10 Jan. the warning must be by the Plaintiff, and then the payment must be January next after three months warning, Tr. 1650. Rot. 1607. Wentworth *against* Wentworth: The Court held rather, then duty should be lost, the Assurance should be made within any month after Request, the Condition of the Bond being to assure within a month when he should be required, and this admitted the Plea of the Defendant, the day of payment being not yet come, is only in abatement. Twisden conceived the payment to be any January after (which is the same as upon) three months warning, as to pay upon Return of a Ship, i. e. after its Return. Judgment for the Plaintiff, Nisi. (122) Condition. Moor 313. pl. 454.

Vernon *against* Alsop. Ante.

WIndham conceived the Condition void, and the Bond single, or according to the meaning of the Bond, to transpose the words, making it if Default, be then good, if not, then void: But Curia contrà. Adjornatur. (123) Obligation.

Lewis *against* Bull. Siderf. 97. pl. 25.

IN an Action of Debt, the Defendant pleaded it was for performance of Covenants, and that he hath performed all, not shewing forth the Indenture: To which the Plaintiff demurred, as Syderton *against* Netherton, and Day *against* Lambert expressly, he must set it forth, which the Court agreed. Judgment for the Plaintiff: which, as a Rule, may decide the same point in the rest of the Actions now pendent. (124) Covenant. Moor 3. pl. 9. so in pleading performance or on Award but by 7 H. 4. 1. pl. 1. it ought to be set forth by parol on *Oyer*, demanded by the Plaintiff.

Russel

In Continuance, Br. 51. Ruſſel *againſt* Lea. Ante.

(125) Infant. IN Action of Debt on Bill given in Security for mony due for neceſſaries. The Defendant pleaded Nonage. The Plaintiff replys it was pro Neceſſario apparatu, which per Curiam is well enough the laſt Caſe, 3 Cr. 928. And if the Bond be unreaſonable, then Iſſue may be taken, it was not due for Neceſſaries; and then the Plaintiff muſt ſhew the Bond to be ſuitable to the price of the thing, and the whole Bond is void if the price be unreaſonable, 21 H. 6. 31. b. per Paſton, 26 H. 8. 2. was always taken of Obligation with Condition; and here by Demurrer, the Defendant hath confeſt it due. 2. It's a Bond for Neceſſaries eidem deliberat. and doth not ſay it was pro neceſſariis of the Infant, as 2 Cr. 560. But Popham 151. 2 Cr. 494. agreed it well enough without it, and ſo the Court here. Judgment for the Plaintiff, Niſi. 423 pl. 148.

Moor 555. pl. 752.

Smith *againſt* Jones.

Tueſday, Novemb. 25.

(126) Baron & Feme. ONe Mrs. A. came to Smith, and deſired him to ſue her by the Name of Jones, in which Action ſhe pleaded ſhe was Covert Baron by Carre, and ſo by Declaration, Plea, and Iſſue the ſame Term, giving notice to Carre, who tried the Cauſe, and a Verdict for the Defendant, that ſhe was covert with Carre, of which practiſe Smith knew nothing: And now Carre prayed this Judgment might be ſet aſide, which the Court granted ſub modo, that the parties try the Iſſue in the Spiritual Court.

Eſcourt *againſt* Stokes.

(127) Leet. IN Replevin, the Defendant avows for Diſtreſs for pain aſſeſſed in Leet, for not ſerving there as Conſtable, nor finding ſufficient Deputy, according to the Cuſtom, that he that is choſen muſt ſerve per ſe, or another: And the Preſentment is, that the Plaintiff ſhould find ſufficient perſon to ſerve for him, not giving him liberty to ſerve himſelf; for which cauſe Jones for the Plaintiff demurred. Judgment for the Plaintiff, Niſi.

Hallam

Hallam *against* Barcroft.

IN Ejectment in Special Verdict, Allen for the Plaintiff; The King grants Advowson to an Infant, Lessor of the Plaintiff, then a Caveat is entred, and after he is Instituted and Inducted by Letters Mandatory of the Ordinary, which is good enough, 38 Ed. 3. 9. Pl. Com. 528. And the Defendant is after Inducted by the Arch-deacon the proper Officer, and continueth till the Act of Confirmation of Ministers, viz. from 45. to 59. and instituted by the Vicar General, which is void, coming after the other; and so the Plaintiff ought to be restored. Adjornatur. (128) Church.

Corporation of Southampton *against* Richards.

IN Debt, the Count was that Felo de se, the Obligée, was commorant within the Will, which may be in the County, and they entitle themselves by Grant of Bona & Catalla infrà Villam, only S. being Town and County: But per Curiam that should be specially pleaded, and by appearance is made good. 2. By the Grant of Bona & Catalla generally, Obligation will not pass, which was agréed. But by Allen for the Plaintiff, in this Case of Grant of Bona & Catalla Felonum de se, all the Forfeiture, as well Debts as other things, will pass, which Windham agréed; and so are all the Grants to the City of London, this being an Inheritance known by no other Name, which the rest doubted, P. 11 Jac. Duckets Case in Exchequer, Resolved that things in Action do not pass by such Grant of Bona Felonum, and so was 4 Jac. Fourd *against* Shelton, 12 Co. 1. 29 Eliz. the Lord of Northamptons Case, and the Lord St. Johns Case. 3. When one alledgeth Inquisition, it must be præsentatum est, Westm. 1. cap. 10. But in pleading it's sufficient to say Compertum est. Adjornatur. (129) Coroner. Moor 127. pl. 274. Owen 155. 2 H. 4. 2. per Till.

Coldham *againſt* Loe.

Wedneſday, November 26.

(130) Viſne. IN Action on promiſe laid (in the Pariſh of D. in the Ward of P.) in Norwich, and the Venire Facias is of the Pariſh generally, which may extend into ſeveral Wills or Wards, which Wild, the Kings Serjeant, aſſigned for Error, ſed non allocatur, 2. Brown *againſt* Every, the Sheriff need not Return the name of all the 24. on the Diſtring. or Habeas Corpora, or Venire Facias, nor affix them to the ſaid Writ; Judgment affirmed.

Sinderf. 97. pl. 26. Caus *againſt* Roberts.

(131) Slander. ERror of Judgment in the Borough of Southwarke, in Action for calling the Plaintiff Brazen-faced-whore, and running away with the Defendants Husband; Cuſtom being alledged that all Whores, Lenones, and ſuch as keep any Bawdy-houſe, Commorantes & Exercentes ſuch trade there, are puniſhable there by Corporal puniſhment; which by Maynard is ill, being all one Sentence, is intended only of ſuch Whores that keep Baudy-houſes, Commorantes & Exercentes, and theſe words do import ſo much; contrà if it had been all Whores or Lenones, &c. which the Court agreed. Judgment Reverſed. Niſi.

Moor 136. pl. 280.

Baker *againſt* Weſcot.

(132) Maintenance. IN Action upon the Statute of Maintenance, Quære if on 18 Eliz. 5. the Defendant, on Nonſuit of the Plaintiff, ſhall have Coſts. Adjornatur.

The King *againſt* Chute.

(133) Place JOnes excepted to an Indictment for not ſerving as Conſtable, according to the order of the Juſtices of Seſſions, for not alledging any place where he was requeſted to take the Oath; And quaſht, ſpecially being on order repealed by the Juſtices of Aſſize on Appeal.

Brian

Brian *against* Fitzharris. Ante.

Tr. 14. Car. 2. Rot. 1353.

AS Newis *against* Scolastica's Case on demurrer on Evidence on general Issue, the fact is agreed, viz. that such a Writ was taken out, Dy. 239. and therefore the Jury may find it taken out, but here they could not find, it being confessed; by Twisden, and the Judge before whom the Cause was tryed, ought to have directed it, which the Court agreed and so no Error. But 2. By Foster, this Consideration is void, being unlawfully to forbear Jesuite, which the Court agreed. Adjornatur. (134) Estople.

The King *against* Sadler. Sinderf. 97 pl. 27.

COleman prayed Restitution on Indictment on 8 H. 6. of forcible Entry and deteiner; the Verdict find Guilty of peaceable entry, and forcible deteiner, and that the party need not be indicted de novo of forcible deteiner, the Statute 31 Eliz. putting Lessee for years in the same Condition, with Tenant of the Freehold, on 8 H. 6. and per Curiam Restitution awarded, Nisi; the Verdict being sufficient for part, without new Indictment, contrà to Yelverton 99 pl. 135. (135) Restitution.

Anison *against* Starke.

Tr. 14 Car. 2. Rot. 1690.

IN Action on indebitatus infrà inferior Jurisdict. for wares sold and delivered, not saying where; after Judgment by Non sum informatus assigned for Error, that the Sale was not said infrà Jurisdict. Sed non allocatur, per Curiam, the Indebitatus being created by Law, 2. Its that the Defendant per attornatum venit & dicit quod non est informatus, which per Curiam, is Error. So 3. Judgment quod recuperet for recuperari debeat, being executory, Error per Curiam. And Judgment Reversed, Nisi. (136) Jurisdiction.

Blunt *against* Symson.

(137) Rent. IN Action of Debt for Rent on a Lease, not saying by Deed: The Defendant pleaded the Plaintiff had nothing in the Land at the time (as 5 H. 7. 3. primo deliberat' on Bond) The Plaintiff replieth, it was by Deed, and so that Plea ill: To which the Defendant demurred, supposing it a departure, sed curia contrà; The Deed being but the Evidence of the contract, and therefore its sufficient in the Count to mention the Contract. Judgment for the Plaintiff. Nisi.

The Justices of Peace of Darby *against* Gillibert.

(138) Bastard. BIgland moved for Confirmation of an Order made in pursuance of Order by Overseers to place Bastard-Child an Apprentice, with Gentleman that had no Trade, who having refused it; made this course. Windham conceived, they that are grieved have no remedy, but before the Justices, who in this Case are Judges of the fitness of the parties with whom they place them, which Foster agreed; and that if the party have wrong upon his Indictment, or Information preferred, on contempt, or refusal to obey the Order, he may plead it; contrà by Twisden; they may tax any man; but he doubted the Statute never intended to give such Power, because so they may put the Child of my greatest enemy on me: Also hereby London will be sufficiently discharged from taking great sums with Apprentices. Adjornatur.

post. 517 p. 103

In Chattels Br. 11. Buxton *against* Bateman. Ante.

(139) Church. WIndham conceived, that after the Verdict, the not saying ad nefluagium pertinent is not material; contrà by Foster: And that the Reparation ought to be averred, being part of the Title. Adjornatur.

Harrison *against* Vandebecke.

Thursday, November 27.

(140) Executors. ONe as Executor de son tort brought Scire Facias on Judgment had by the Testator, and on 2 Nichils, and after Execution, H. as Administrator brings Scire Facias on the same Judgment, as per Curiam, he may, and Recover the Money all over again, as by Twisden hath been before 15 Car.

Car. 1. and the party is left to his remedy against the pretended Execution.

Flower *against* Mahew. Ante.

(141) Trover. TRover de uno Scamn' planca, Angl. a Plank Bench, good, being mistaken for Stanna, &c. 2. De una Salsura, Angl. a Salting-trough, which though insensible, the Verdict shall be intended to give Damages for that which is good, Hub. 38. and 2 C. 403. That 3. this Action being by Executors, they do not proferre literas Testamentarias, for which cause, though after Verdict, Wallop for the Defendant, conceived it ill; Twisden contrà, because its no part of the Count, but cometh in after the inde producit sectam, and it was introduced in favour of the Spiritual Courts: And all the presidents since Car. 1. have both that its needless, the same of Administrators, which the Court agreed. Judgment for the Plaintiff, Nisi.

The King *against* Brown, In Coron Fitzh. 401.

(142) Admiral. THe Defendant Justified, by Warrant of the Admiral, the taking Verdict on a Body hanged in a Ship at Blackwall, which by Keeling for the Coroner, is void, as 2 Cr. 544. notwithstanding 13 R. 2. c. 13. or 15 R. 2. cap. as 4 Inst. 113. & 135. being done within the Body of the County, 27 Eliz. cap. 7. 8 Ed. 2. Coron. F. 399. and Stanford 51. which all Rivers are, 3 Inst. 73. cap. Coron. the Land on either sides whereof may be discerned; and the Statute of 15 R. 2. c. printed, for Death and Maim is below the Bridges, whereas the Roll of the Statute is below the Points; i. e. where no Land is visible, 28 H. 8. cap. 15. Windham, In Creeks and Havens, the Common Law and Admiral have divisum imperium, and so of Points; Milford Haven may be seen from the West parts. But by Keeling, Deal hath been adjudged within the Body of the County: but yet to punish the Defendant, where his Warrant is doubtful, is unreasonable, which the Court agreed; but to settle this Point, ordered an Information against the Admiral, who as the Coroner, had taken the Enquest.

Ante

Ante. 411. pl. 115.

(143) Trades. Surgeon or Scrivener are no Handycrafts within 22 H. 8. cap. 13.

THe Court conceived a Barber a Trade within the Statute of Eliz. but in such Action of Debt tam quam, need not be said a Common Barber; contrà in Action for calling him Bankrupt, or in Information or Indictment against them.

King *against* Locke.

(144) Assumsipt.

IN Action by Executors on Indebitatus for wares sold to pay quantum meruit, not shewing what the particulars were: For which Cause Barwell moved in Arrest of Judgment, the difference having been betwixt this and indebitatus in certain Sums, for diversis Mercimonijs ante tunc venditis, this is good enough; for then it must appear, that there was some particular agreement to pay the 20 l. or that the Goods were worth so much: But the Court conceived both Cases well enough; sed Adjornatur.

Sir Thomas Fanshaw *against* the Inhabitants of S.

(145) Way.

JOnes excepted to an Information against the County for not repairing a Bridge, alledging there was no Hundred, Wapentake, &c. bound to do it, and say not (nor any other person) were known: But per Curiam, after Verdict, this is well enough. 2. It was said 3 October there was a certain Bridge for all the Kings Subjects Ire, redire, &c. 3 November fract' & adhuc est ruinosus (not saying qui quidem Pons, &c. 3 November fuit ruinosus) which the Court conceived well, being after Verdict, though Information be not within the Statute of Jeofails. So in Adams *against* Lopus, in Action upon the Case, quod sciens canem ad mordend. Oves Consuet. scienter retinuit, (not saying canem prædict. yet adjudged good after Verdict in the Common Bench cited by Twisden to be this Term. Adjornatur.

The

DE TERMINO Sancti Hillarii

14 & 15 *Car.* II. *B. R.* Die Saturnii, Jan. 23. Anno 1662.

Foster *Chief Justice.*
Mallet,
Twisden,
Windham.

Hallam *against* Bearcraft. Ante.

IN Trespass on Special Verdict, Powis prayed an Amendment according to Deed given in Evidence, after Draught with Counsels hands, though the Notes did not warrant it, which the Court denied, only by consent referred it to agree, &c. (1) Amendment.

The King *against* ....

BAldwin excepted to an Indictment of Trespass at Sessions of Borough of St. Ives, held before the Mayor, that it's said quod Juratores impanellati & Jurati, &c. præsentati fuerunt, for præsentatum, &c. which is but a Recital; quasht per Curiam. (2) Indictment.

Billage *against* Blake. Ante.

(3) Variance.

IN an Action of Covenant, Allen moved in Arrest of Judgment for Variance betwixt the Count and the Déed, there being a Bond given for performance of Covenants; and the Action is only founded on the Clause of the Covenant, viz. to deliver Salt-peter at a day, and relating to the Déed, which on Oyer demanded, mentions such a Covenant; but further giveth liberty, that if the Defendant, by act of God, be disabled, he should not pay, which by Jones is well enough, the Déed being not pleaded in hæc verba, nor the Action founded on the Penalty, but only on the breach of Covenant, for not delivering: And it's more proper for the Plaintiff to Count as his Case, and the Defendant to shew the Releasance, as Utreghts Case, which the Court agréed, there being no demurrer on Oyer demanded for Variance, as Hut. the Case of Alom-works, but on Collateral points. But 2. by Allen, the Issue can make nothing in this Case, the Bond and Déeds being entred in hæc verba, if the Count do vary it's ill: And to this end men demand Oyer to save this advantage: But per Curiam, if the Count be of Bond, dated 1 May, and the Entry is of 2 May, on Release pleaded, and Issue thereon, it's good enough; and here the Issue was on the disability: And here it doth appear the Plaintiff hath cause of Action quoad the Substance. Also by Jones, here the Plaintiff hath agréed the Déed to be the same; but if he had pleaded Non est factum, he might have had advantage of the Variance.

Judgment for the Plaintiff, Nisi.

Knight *against* Palmer.

(4) Amendment. March. 1. pl. 2. He must say of what Estate the Grantor was seised. But March. 166. pl. 233. to travers the Seisin of Services incident by Grantee, &c. is ill.

IN Replevin, the Defendant avowed for Rent-charge granted by H. seised in Fée. The Plaintiff in Barr pleaded H. was not seised in Fée, to which the Defendant demurred, and after Entry as Concilium, but never argued. Wild Recorder, prayed an Amendment, because it doth not appear H. is dead; and so if he be alive, it would be good so long as he liveth; but the Court refused, it being in another Term, but gave them leave to discontinue.

Noye

Noye *against* Downing.

NOta pro Regula per Curiam, and Jeakell Secondary on Ne recipiatur entred on default of the Plaintiff, the Plaintiff may try it the next sitting without notice, in Middlesex, before the Chief Justice; but if he delay the next, the third he cannot try it, without eight days notice, as at first, though this be in the Term, and a new Trial awarded on notice, being only two days before such Trial. (5) Tryal.

The King *against* Sadler. Ante.

JOnes excepted to an Indictment of Forcible Entry and Deteyner, that was found that the Defendant was Guilty tantum of Peaceable Entry, and Forcible Deteyner; he agreed, That on such Indictment the Jury may find Guilty of either part, as of Forcible Deteyner, and Not guilty for the rest. And so by Baldwin for the King, If H. be found Guilty of any part of the Charge, whereby the King is intitled to a Fine: But then the Verdict, being further, that the Defendant was not Guilty of all the rest, but that part whereof he was found Guilty, it's well enough. And so by Twisden, on great advice on the doubt, whether on Indictment of Forcible Entry and Deteyner, H. may be found Guilty of one; it was Resolved that it may well enough be, the Statute forbidding both. Restitution awarded for the Plaintiff, Nisi. (6) Force.

Bacon *against* .....

THe Plaintiff declared by the Name of Bennettus: The Defendant pleads his name was Benedictus, and doth not say that his Name was not Bennettus, and Issue thereon. 2. The Plea was, That prædictus Bennettus habet pro nomen Benedictus, which being of Christian Name, is ill, but of Sirname it's otherways; for one may have many Names. Carew prayed an Amendment, and awarded per Curiam, but to avoid paying Costs. By Allen, should the Issue be found for the Defendant, it would be a Jeoffail, there being no denial that his Name is not as the Plaintiff counts: But the Replication being that the Plaintiffs Name was Bennet, absque hoc, that it was Benedict, and thereon Issue is taken, and so it being void, Costs were not to be paid; the Court conceived it well enough: And that the Plaintiff, after Issue joyned in Paper, cannot waive his Count, but the Defendant (7) Nosme. Moor 687. pl. 1260. *Elen* for *Elionor*. Cambd. Rem. 38. in tit. Names its said *Bennet* is the corrupt for *Benedict*. So in assise of Lands in C. the Defendant said they were named D. and doth not say, *and not* C. yet good. 6 Ed. 3. 1. b. pl. 2.

may waive his Plea; and the course of the Court being, that on the Plaintiffs Amendments the Defendant is to have Costs, or an Imparlance, the Court Ruled him to one, viz. to accept of Costs; and so Amendment granted per Curiam.

Flower *against* Mayhew. Ante.

(8) Trover. TRover de una Salsura, Angl. a Saltingtrough which by Wallop, in Arrest of Judgment, is ill; as Tr. 24. Car. 1. Herford *against* Hobson de Cervitio Argent. Angl. a Silver Salt-seller, adjudged ill P. 1652. Morgan *against* Lloyd, Trover de quodam Instrument. Ferreo, Angl. Racks, Brandirons; Judgment Reversed as ill, there being another proper Latin word for the same things: But by Windham, when the proper Latin is insignificant, as Salsura is, So Duodena fili, ruled that Damages shall not be intended given for them; so here; contrà de uno instrumento, &c. which is too general to apply to any particular. Twisden agreed, that where the words are insignificant, no Damages shall be intended given for them, when generally given inter alia; but here Damages are particularly given for this Salsura, &c. and so its ill: To which Windham and the Court inclined.

Adjornatur.

The King *against* Hardy. Ante.

(9) Force. POwis excepted to an Indictment of forcible Entry, 1. That its taken before A. & B. Justices, not saying at general or Special Sessions: Sed non allocatur, for any may take it any where. 2. Quod expulerunt & disseisiverunt. H being said to be seised in Fée, according to Custom, of the manor of Copyhold, which by Windham, is well enough, there being a Seisin in the Copyholder in common pleading, contrà of Lessee for years: But by Foster & Twisden, such Indictment was not good at Common Law, and 21 Jac. giveth only remedy by Indictment, which must be by expulerunt, for Disseisin must be taken in suo genere, as it is. But by Allen, here Disseisivit is but surplusage, and there are other sufficient words to express Entry, and ousting of him, as quod Ejecerunt, expulerunt, &c. But by Twisden, the Indictment shall not be Aided by Intendment, though after a Verdict.

Adjornatur.

The

The King *against* the Inhabitants of Somersham. Ante.

Saturday, Jan. 24.

PEmberton moved to stay Distringas grounded on Westm 2. c. 46. awarded Nisi, after Writ of Enquiry who, and what value the Wast was, and another after that returned to Enquire of Damage, 2 Inst. 476. which is found to 900 l. being not within the Statute, which was only intended against Commoners on Improvements, not where Hedges are casually thrown down, 15 Car. against the Inhabitants of Darby, the Court refused to do any thing, without Scire Facias on the Enquest; So 14 Car. the King against the Inhabitants of Frampton; And so he prayed that Execution might not be awarded on such Writ of Enquiry. Jones moved for time to plead, which hath never been denyed, Gibbons Case 1 Cr. 280. But by Twisden, the Exceptions, that there is no Indictment, or that it was not by Commoners, must come in on the Defendants side; and therefore they may have time to plead: And by Windham, this Statute relates to the Statute of Merton, and can only be on Improvements, which the Court agreed, and allowed the party to plead on the Distringas. (10) Common. Sinderf. 107. pl. 19.

Manby *against* Scot in the Exchequer Chamber. Ante.

In Contract. Br. 19.

HYde for the Defendant. Its agreed that generally Feme Covert cannot charge, without assent precedent or subsequent of the Husband, but whither she may charge him for Necessaries, hath been doubted: And I conceive, that for them he shall not be charged, though he allow her no Maintenance; for she hath no will legal, Pl. Com. 13. 17. and so here can be no actus contrà actum, or as Dr. & St. cap. 6. any aggregatio mentium, necessary in all perfect contracts: and the difference of the Books is, that its not the Contract of the Feme that binds the Husband, but his Licence, which may be expressed or implyed in the coming of the thing bought to his use; and the Authority of Law is to be allowed by the consent of Books, not by single Opinion precedent; and the inconvenience (which the Judges in all Cases, specially heed, as 1 Co. 52. 1 Inst. 279. & 379.) following, if he should be charged (11) Baron & Feme. Modern, &c. 128.

charged, are of great weight: She might on complaint take up of several Tradesmen, Linnen, Woollen, &c. in infinitum, and each of them hath as Just right, as the other, to his Debt on such Contract: And though the Law is not to be changed for inconvenience; yet when doubtful, the inconveniences are considerable to determine one way or other, and it doth not appear she wanted apparel, or ever asked him for supply. And though the Husband be bound to provide for his Wife, yet only so long as she is helpful to him, and liveth with him. And by her wilful separation, without the Churches Sentence, she is out of his protection and provision, as Pl. Com. 315. F.N.B. 232. Subject is out of the Kings, by denying his Authority, which are their own defaults, to seek to set up imperium in her self, contrary to his, and by the F. de nuptiis of the Civil Law, Si uxor virum propria temeritate reliquerit non tenetur vir sibi alimenta subministrare; So the words of an Appeal are, quod occidit virum inter Brachia sua, as Register; so unless she be inter Brachia viri, she shall not have Maintenance; for by the Law, in no Case, nor for no Color what ever, she cannot depart from her Husband, F.N.B. 238. If she be in fear, she may have supplicavit against him, and on want of Maintenance, she may Complaint to the Ordinary, who first joyned them, Si uxor quæ propria culpa a viro recesserit sit pœnitentia ducta.

So on Elopement, its not sufficient to say she came to her Husband, and prayed him to be reconciled, and he refused, without actual reconcilement. 3 Ed. 3, 23. b. pl. 9. Yet is not sufficient to say she Eloped and was to not Reconciled to her Husband during Life (without shewing she remained with the Avowterer) to prevent her of Dower. 6 Ed. 3. 29. pl. 1.

Therefore she should not barely have desired, but submitted; and if she will rather starve then submit, as in Pl. Com. 68. of Debtor, let her starve, for the Law provides for none in such Condition; and it is no more strange to send Women to Spiritual Courts for Alimony, then for C. B. to send Cutpurse into B. R. or B. R. to send Feme for Dower into C. B. or into Chancery for Equity, Caudries C. 5 Co. 39. L. Entr. 228. Bract. 107. this being an incident to Matrimony; Bract. 61. lib. 2. c. 6. which 24 H. 8. c. 12. recited of Common Law to belong to them, 1 Cr. 220. Blakes Case. The reason of the Prohibition to the High Commissioners was, because Alimony properly belongs to the Ordinary, 14 H. 6. 14. If the Husband appear, and Feme be waived, she cannot purchase Pardon without him, 18 Ed. 4. 4. Thus the Law giveth him remedy to tame her; but she hath no remedy against him: And L. Entr. 4. Co. Entries 38. no Trover lyeth, because no wrong is done, it being his own default to deliver them to a woman, Action upon the Case, Br. 109, 113. and Not guilty must be here pleaded, 1 Cr. 10. 104. for conversion before coverture, or during coverture, when its by wrong, and against the will of the party, as after contract, 21 H. 7. 6. 14 H. 8. 22. One takes away his Mony and Goods, Trover lyeth; but if the Seller take

take his word to pay at Mich. no Trover lyeth, 11 H. 4. 83. 26 H. 8. 2. And this Case differeth not from that of Infant, if he know her to whom he sells to be a Feme covert, and in Trover only, the property is inquirable, not any circumstances of necessary convenience, &c. and this would beget the same inconvenience: And the Statute of Merton, c. 7. 2 Inst. 93. it's a disparagement to many a Burger, much less should such therefore be Judges of differences betwixt Gentlemen and their wives: But 2 Inst. 56. reasonable, necessary, is Quæstio Juris, and to be decided by the Court, 22 Ed. 4. 38. but were it admitted he were chargeable, yet Judgment ought to be against the Plaintiff: For as in Assault against Baron & Feme, Yelvert. 106. it appeared she only had assaulted, held ill; because it ought to have been special of Assault by her: So here the Count ought to be special, and the general Authority given by Husband to the Wife, F. N. B. 120. is repealed by this express Prohibition, which doth no more take away all the power of the Wife, then Feoffment not to alien to J. S. and one may as well prohibit to trust his Wife as his Servant. 3. The Verdict find the Wares necessary and fit for the Husbands degree, but shew not what the Wares were, nor that they were for Apparel; and without particulars the Court cannot judge, none being mentioned in the Count or Pleading. Mallet for the Plaintiff. Ante.

The King *against* Newton, &c. Ante.

Monday, Jan. 26.

(12) Bastard.

ALlen excepted to an Order of Sessions made for taking a Bastard-child Apprentice, not shewing that the child was a poor child, and charged on the Parish, nor in what Trade he was to be bound to, but especially because (43 El. c. 2 §. 5.) that it shall be lawful for the Churchwardens, with the assent of the two next Justices, to put out such children as aforesaid, where they think convenient) doth not restrain them to the bounds of the Parish, but giveth them liberty to do it any where; and such binding shall be as effectual, as if the child had been of age, and bound himself; which here could never have been to this person, being Tenant at will in the Parish, especially no longer then they remain in the Parish: Nor the Law never intended that any person should be bound to take. Bigland contrà, That this is no inconvenience; should an Alderman of London come into the Parish and use Husbandry, such Servant is able to do him Service, and to be a benefit

benefit to him, and so no inconvenience; and without compulsion none will take them but in hope of gain; and such do generally beat, and by hard usage destroy the poor children, or cripple them; 9 Car. by Hutton and Croke, to whom the Justices referred such Case, resolved accordingly: And an Order made by the Council Board to quicken the Judges in all Counties to the like Rule. And by Foster, the Statute would be fruitless, should there not be compulsion to take, as well as put out; and a child was laid to a person that occupied Lands in the Parish, as was resolved by all the Judges of England on debate. Twisden, The Parish should raise a Stock for putting out such children: So Farlyes Case in Kent, the Justices menaced him, but would not force him to take him against his will without consideration; else the greatest Enemy I have may be put on me: But by Foster, it was part of the Resolution of the Judges, that consideration should be had of the age of such children. Twisden, It was held, as I alledged, all Huttons time. Windham, The meaning of the Law was only to advance Husbandry, not to bind to other Trades, Dalt. Justice, p. And it will be intended the Sessions, being a Court, will do justly, and it's without mischief that it be so. But that which staggered his Opinion was the division betwixt the Judges, on putting the Case at Serjeants Inn in Chancery-lane; but yet he conceived they may place such children where they please. Twisden conceived the better Opinion of the Judges in his Inn in Fleetstreet, to be of his Opinion. Mallet accorded with the other two. Steers Case of Maidstone in Kent on an Information, ruled that the Parish could not force one to take an Apprentice: But notwithstanding the Court confirmed the Order, and held the Exceptions insufficient.

The King and Miller *against* Sadler. Ante.

(13) Force.

Jones excepted to an Indictment of Forcible Entry, That it's said Coram A. & B. Justices, and that after at another Sessions before A. and B. it was tried, which must be intended private Sessions, which have no power to try: And though there were a Precept to the Sheriff, and eight Justices present, and within a Liberty, yet the Court will not intend it good: Nor, by Windham, ad Sessionem Pacis shall be no more intended of private then publick Sessions. He doubted whether private Sessions may not try the force. Twisden, Ad Sessionem Pacis tent. for such a place, is intended at general Sessions; but ad Sessionem coram A. & B. &c. Justices, is

is intended private generally. 3. Here it appears the Justices have joyned Issue, and tryed it the same day; though Justices of Oyer and Terminer may do so, Justices of Peace cannot without consent, which was here given, which Foster agréed: And that here being Ad Sessionem tent. pro Libertate Clausi Canonicorum de Sarum, it's well enough. Also by Windham, No Continuance is necessary to be entred in the Certiorari from one Sessions to the other, but it must be by Adjournment or Venire facias, as Samsons Case, which here had no time of its Return. Adjornatur to search Presidents.

Siderf. 100. pl. 4. Parker *against* Williams.

IN Prohibition on Suit for Dilapidations, on Suggestion that the Freehold was in question, 12 Co. 65. Roberts Case, Register 58. which by Windham, shall never be till they disallow the Plea pleaded: For if Letters Patents, or Act of Parliament come incidently in question, they may try and judge it, according to the Rules of our Law; but if they refuse such Plea, Prohibition lyeth. Twisden, Hub. 52. They cannot try any title by quarrel at Circumstances, as at Institution, and so avoid Presentation, tried at Common Law. And this Suit for Dilapidations is only for Damages; and Minister, or not Minister, cannot be tryed by them, which Foster agréed: But on Suggestion that the Spiritual Court will not allow the Plea, Prohibition awarded: And by Twisden, on a bare Suggestion, without actual pleading in Spiritual Court, and refusal; Sed Curia contrà. (14) Prohibition.

In Chattels, Br. 11. Buxton *against* Bateman. Ante.

IT being an Action upon the Case, grounded on possession, Twisden and Windham conceived it well enough; contrà in a Prohibition; then usage to Repair must be set forth in the Count: Foster contrà. (15) Church.

Bayly *against* Lewis. Ante.

Tuesday, Jan. 27.

(16) Account. If *H.* come in by *Cap. ad respond.* only he shall not be *per main-pris*; but *contrà* if he came in by *Cap. ad computandum*, 11 H. 6. 31. b. pl. 18. *per Curiam.*

IT was agreed by the Court, That common Bail is sufficient in Account originally begun in B. R. but when special Bail is put in in London, in a Cause removed here by Habeas Corpus, it was doubted whether it should be discharged, or stand only as common Bail; but after Judgment, quod computet, Capias goeth forth, and on Return of that special Bail is requisite. 2. When Bail is put in to one Cause in L. it stands for all on removal hither the same Term: But if no Declaration be in three Terms, or if Nonsuit be after, its discharg'd but only against him that was Non-suited. Adjornatur.

Taylor *against* Gore.

(17) Administrator.

WIndham conceived that Administration cannot be committed of part of any debt, but may be severally of the Goods in several Counties; Sed Curia contrà: They may commit Administration to as many as they will, but not by several parcels, because given by Statute, Dy. Adjornatur.

The King *against* Sadler. Ante.

(18) Process.

VEnire facias ad Respondend. &c. without day, is good enough, and cured by Appearance: But Venire facias ad triandum, whereby the party may be Utlawed, must be returnable ad prox. Sessionem by Twisden, and so is the course, which the Court agreed. Restitution awarded for the Prosecutor.

(19)

In Departure, Br. 15. Dean *against* Eason.

(19) Arbitrement. *Contrà* of a Repealance in Rejoynder after Bar, that no Will was made.

IN debt on Bond for Non-performance of Award: The Defendant pleaded Nullum fecit arbitrium. The Plaintiff shews it, which was to Release all Actions to the day of the Award. The Defendant Rejoyns, that new cause of Action arose by Trespass after the Submission, and before the Award, which, per Curiam, is a departure, as Nul wast pleaded, and Rejoynder that H. fell'd to repair: And though the Plaintiff traversed this new Cause of Action, and did not demur

demur on the Rejoynder, yet being found for the Plaintiff, Judgment for the Plaintiff, Nisi.

The King and Davies *against* Hardy. Ante.

(20) The Court conceived the Indictment ill, being Copulative quod expulit & disseisivit of Copyhold. 337. pl. 443. Force.

Smith *against* Taylor. Ante.

(21) In debt on Articles of Agreement to pay Annuity during the residue of Term assigned to J. S. not shewing for what Years or Term, and Breach assigned in Non-payment during the Residue of the Term, without saying Yet to come: And so when the Damages are laid, the Term might be expired; after Judgment by Nihil dicit, the Court conceived it to be ill; contrà if the Verdict were, then a Term will be intended, as Hub. 3. Puncionby *against* Rudge. Adjornatur. Rent.

Neale *against* Dennise.

Wednesday, Jan. 28.

(22) In Action upon the Case for words laid in London, after Imparlance, and before Plea, farther than in paper, Evesque Ely, by special Warrant to Attorney shewed in Court, and Charter pleaded, demand Comusance, as Dy. & 40 Ed. 3. 10. b. Suggesting that the words were spoken at Ely, which the Court doubted, the Action being Transitory; but agreed that of things local he might do so, being not summoned, as the party himself is. Adjornatur. Slander. Siderf. 103. pl. 9. Is not demandable after the Count, 8 Ed. 3. 2. b. pl. 4. He may have it in local Action although he be Plaintiff. 3 Ed. 3. 42. b. pl. 22.

The King *against* the Inhabitants of Somersham. Ante.

(23) The Exception of the quæ quidem fuit in decasu being over-ruled, a new Trial was desired, because the County being charged to Repair, several that were of the County were allowed Witnesses, which, per Curiam, is ill if such person be chargeable; but if not, he may be a Witness. Way.

Wheatly *against* Thomas. Ante.

(24) Tayl. George Lord Cobham seised, devised to the first Son for Life, Remainder to his Son, and the Heirs of his Body, and so to eight Sons: William the Eldest hath Issue Henry Lord Cobham, and George Brook, who being seised to them, and their Heirs Males, the Remainder to Edward the younger Son in Fee; that Henry and George are attainted, and now dead without Issue, and so the Lands come to one Daughter of William, lessor of the Plaintiff: He agreed all the Estates, as in Henry by the Will, are forfeited by the Attainder, and no more: And the Act of Confirmation, 3 Jac. 26 H. 8. 13. 32 H. 8. 20. doth only declare the effect of the former Attainder, and applyed it to the Lands in question, to satisfie the Lay gents and Encourage purchasers, and so as Earl of Leicester, Pl. Com. 368. The Attainder being Erronious, no new Attainder is made: Whence I infer, that the Act 3 Jac. could only be for settlement of the Estate, whither it enure by way of Grant or Restitution; and though the King had several Estates in him, as Fees determinable, whither conjoynd, or severally in him, may pass by Patent generally, as 1 Inst. 118. all the Males are to inherit before any Females, as by the Will, notwithstanding any Fine, Recovery, or other Act, which extends to the Attainder it self. And though the Proviso in 7 Jac. be, that the Restitution should not extend to any Lands in the King by Attainder, that is answered by a farther saving therein, That the Lands given to Duke, by Act of Parliament, or other lawful means, should be as effectual as in him, had there been no Attainder: And so as to this Manor, the disability being removed, before the Title of the Plaintiff Commenced, and so as Godfry and Dixons Case, 2 Cr. She is enabled to take, and Remainder to the Son of an Alien, is good, if the Alien be naturalized before his Death; and this is a stronger Case, being only ratione culpæ, and avoided by the Act of Parliament, 15 H. 7. 10. Lands given to a married Man, and Feme of J. S. in Tayl. is present Execution with Cross Remainders, Br. Done 42. Dy. 56. The Law doth not suppose this such a remote possibility, or contingent, but that it may take effect, Dy. 274. And I conceive the Plaintiff was remitted, as Kell. 58. and so prayed Judgment for the Plaintiff. Allen for the Defendant, Henry was seised to him and his Heirs Male, the Remainder to George, the Remainder to Henry as Heir Male of William, the Remainder in Fee by the Death of Edward,

ward, and the Plaintiffs as Heirs of William cannot inherit; Every Clause of 7 Jac. is only to restore the Issue of George in Blood against his Attainder, but not against the Attainder of Henry; that is still a stop to them: And by particular proviso, that all Estates shall remain in the King, as by Attainder of Henry; and the particular saving makes nothing to the Heirs of William the Son of George, who had by 3 Jac. a particular Estate given him; and Henry was now his Heir, and William was in as good Case without this Act as with it, the Attainder of Tenant in Tail in Remainder, before his Remainder vested, hindering nothing, but the Son may after Inherit, as the Lord Lumlyes Case cyted in Dowtyes Case. As to 3 Jac. on which the question mainly rests the Remainder limited to William the Grandfather, cannot be Revested, and as a new purchase it cannot be, because at this time there was no Heir of the Body of William, Henry being Attainted; William the Son of George being Restored in Blood, cannot take as Remainder to the Heirs of J. S. dead, or Wonke, or Attaint is void, though he be after deraign'd or pardoned, because as Pl. Com. 27. b. Blodwell *against* Edwards, Moor 430, pl. 602 Remainder to reputed Issue, the Estate in Remainder is not by way of use, but in possession; and A. was in being and uncapable at the time after Attainder made void, H. may plead nul tiel record; but this Act confirms the Attainder, and the Intent of 3 Jac. which may be gathered from the Circumstances of the fact: the Act was made after the Settlement on Duke Brook, which was pendent in C. B. by division of the Justices on Construction of the Patent; as to the other Lands, this Manner of Cooling being supposed setled by the Act, but that it cannot Restore William the Son of George to this general Remainder in Henry, there being no mention of Henry, with any kindness. 2. It runs not as an Act of Restitution, but first changeth the course of the Will, giving to Duke, and the Heirs Males, and then to the Heirs Males of William, then of George, skipping over Harry, and so could not be intended to give him any Estate, though he had an Estate Tayl by the Will: Also Henry at this time continued Attainted, and therefore the Parliament could not be supposed to give him any Estate, without Reversal or Pardon of the Attainder; unless it be expressed to be their meaning, no such Construction can be made. The vesting of Remainder by Act of Parliament to person Attainted, doth not take away the Kings Estate, unless some words be, that he should be discharged of his Attainder, or else by implication. But admitting

admitting the Parliament should make such express Remainder, they would not have generally limited it, but the particular Estates, and especially having provided for all the other Issue Male by express name: And still the Remainder in question is more doubtful, being to the Heirs of the Body of William the Grandfather, which cannot be thus hudled up among general words, especially if it be presumed the Parliament did see the Will; the intent of the Proviso is not against the Forfeiture, but to limit the Kings Grants to persons particularly mentioned, and quoad other Estates, that it go as the Will: And this meaning is explained by the subsequent Clause, that serveth against Fines, Recoveries, &c. And the general Limitation is to no persons, but to such Estates as by the Will, which shall not be the Remainder in Tayl of William the Grandfather, to revest that in Henry, but only qualifie the Estates in Duke Brooke, which was so long as Henry or George had Issue, and now turn'd to a new Estate, being one of the five persons to which this Act giveth Estates with these Cautions: And had the Parliament intended to give Henry any Estate, they would likewise have restrained him from docking any of the other Remainders.

The King and Sheres *against* Larking, Hollingworth, &c.

Saturday, Jan. 29.

(25) Force. Sinderf. 101. pl. 7.

Newdigate excepted to an Indictment of J. S. Weaver, and A. Confectioner, being an English Addition, and there are proper Latin words, sed non Allocatur; for as Laborer, Yeoman, Baker, they are all as good Additions. 2. The forcible entry is in Ecclesiam Parochialem, which Newdigate conceived not within any of the Statutes, there being a proper remedy on certificate of the Bishop to have a Vi Laica Removenda; but Ejectment lyeth de capella, 12 Co. by Windham; Vi Laica, F. N. B. was not to put the party into possession, 5 R. 2. & 15 R. 2. did not give any Restitution to any Churches, but only an Action upon the Statute: And per Curiam, 8 H. 6. extends to all places within the other Statutes. 3. Its said the Plaintiff was seised of the Church, ut de libero tenemento, which, per Curiam, is well enough; for though Layman may have the Freehold, as on the dissolution many had, yet the Parishioner shall have the use.

The

The King *against* Chedle.

IN Error of an Attainder on Scire Facias, the Tertenants cannot plead only Releases, nor doth the Kings Attorny joyn Issue in nullo est erratum: But the Court examined the Errors, as alledged, as Samsons Case, which the Court agreed. Adjornatur. (26) Error.

The King *against* Wright.

JOhnson prayed Certiorari to remove an Order of Sessions, to remove a Gentleman, chosen Constable in the Leet by Spleen, which the Court granted: But whither the Justices may, or not, they will here remove such person, being unfitting, as in Alderman Abdyes Case: And if the new one be not duely chosen, the old one must serve. (27) Leet.

Booth *against* Leech. Siderf. 103 pl. 10.

THou 'art a Trayterly Rogue, said of a Justice, the Court conceived Actionable, as Bankruptly Knave: Or of an Attorny, that he is a Knavish Attorny, is Actionable: So to say, H. is a Cheating, or Bribing Knave, &c. But by Allen, these refer to the professions; not so here. Adjornatur. (28) Slander. 1 Roll. 43.

Stonehouse *against* Bodvill.

IN indebitatus for Wares provided at the Defendants request, and delivered for his Daughter, worth 40 l. which after a Verdict, shall be intended a good Debt; contrà if it had been for Wares sold to the Daughter, F. N. B. By Jones, who prayed Judgment for the Plaintiff; as Tayler and Tirrels Case. Twisden remembred that Indebitatus against H. for Wares, sold at his request to a stranger, staid after Verdict, for not declaring specially, as the Case is, Judgment was staid. Windham conceived in Action upon the Case, the Plaintiff must declare Specially, but not in Debt, nor Assumpsit as here. Also by Foster, the Father is bound to provide for the Child, and so its his Debt, though it do not appear the Child is in the Fathers Tuition. Williams for the Defendant, 3 Cr. 843, the Daughters buying chargeth the Father, no more then a strangers, Rippon *against* Nortons Case: Yelverton, Bosden *against* Thynne: But had (29) Assumpsit.

the

the father promiſed to pay for Wares bought at his requeſt, that would have charged him: The Court agreed, had the Sale been alledged to the Daughter, they would not intend it a Debt in the Father; but now being for the Daughter, it ſhall be intended that they were ſold to the Father now. Judgment for the Plaintiff.

Taverner *againſt* Quaterman. Ante.

(30) Baſtard. THe Court conceived the alledging H. became poor, is a preſent charge to the Pariſh, though no Rule be made; and the Churchwardens ought in ſuch preſent Exigences to provide for the poor, and ſhall be re-imburſed. And it is better that they provide for them in ſpecie, with ſuch things as they want, then to give them mony weekly. Judgment for the Plaintiff.

Aſhburnam *or* Aſpunwell *againſt* Braham.

Hill. 12 & 13 Car. 2. Rot. 814.

(31) Lieu. IN Debt on Obligation to pay at the Houſe of one Yarrow in Woodſtreet Magna. The Defendant pleaded payment at the Houſe of Y. generally, and the Viſne is of the Pariſh of St. Michael in Woodſtreet: And after Verdict, and Judgment for the Plaintiff, this was aſſigned for Error, as 6 Co. Arundels Caſe; becauſe this cannot be intended the ſame place: But, per Curiam, if it be Error, it is only in fact, and ſhould have been pleaded; but now it is well enough. Judgment affirmed. And the Court after Examination will not ſuffer any to quaſh the Record for Male removement, unleſs for great cauſe.

Hardy *againſt* Robinſon. Ante. 201.

(32) Baron & Feme. AN Action of Debt on Bond to the Feme, dum ſola, brought by the Husband ſolely without her, 37 Aſſ. 11. which, per Curiam, is ill: For if cauſe of Action ariſe before Coverture, though but Treſpaſs, where only Damages are recoverable, they muſt joyn; ſo (as this was) in indebitatus, on mony due from the Wife, dum ſola, on account, Action being brought againſt him alone. Judgment ſtayed: And after, by prayer of the Plaintiff, Reverſt for Expedition.

The

The King *against* Taylor.

P. 14 Car. 2. Rot. 492.

(33) Slander.

ACtion upon the Case, quod falso, malitiose, &c. writing and directing a Letter in the prosecutors Name to his Brother, and causing it to be publisht in discovery of a Plot, inclosed in a Letter to a Colonel, by which the prosecutor was taken and imprisoned, and therefore brought his Action. The Defendant demurred to the Count. Post.

Hamstead *against* Oldham.

Trin. 14 Car. 2. Rot. 728.

(34) Replevin.

IN Replevin, Servant alledged property in J. S. which, by Baldwin, is ill, on 11 H. 4. 4. b. 1 Inst. 145. and ought to be claimed in person, or by proprietate probanda. But by Windham, this is intended before the Sheriff; but in Court H. may justifie under any person whatever, as is usual, which the Court agréed, Proprietat. proband. F. 6. For here is no Fine due from H. that avoweth as Servant or Baily. 2. The Plaintiff replys, That the property was in him, absque hoc that it was in J. S. which, per Curiam, is ill: which the Plaintiffs Counsel waived as ill, but relyed on the first Exception, which the Court disallowed, being only an Excuse of himself, and not delay (as 2 H. 6. 14. a.) of Execution. Judgment for the Plaintiff.

Manby *against* Scot in the Exchequer Chamber. Ante,

Saturday, Jan. 31.

(35) Baron & Feme. In Contract Br. 19.

HAles Chief Baron for the Defendant, first looking on the Case, I thought it of little difficulty, and less concernment, but the way of arguing which hath been taken, hath made the Case of great consequence. 1. He premised the nature of Contracts, which are duorum consensus vel plurium, whereby a mutual Obligation is induced, wherein is considerable the persons contracting, which are all not disabled by Law, as an Infant is quoad hoc not universally, so Non compos may bind himself, not his Executors; but Feme covert by our Law in no case can contract to bind her self. 2. The con-

sent, which is the knot and formality of contracts, which is either expressly precedent, concomitant, or subsequent, or implyed in point of Contract, which is such as the Law doth raise: As when I make one my Baily, he may transact, 2 R. 2. Debt, F. 3. & 27 Ass. 5. contract as a Baily for whatever is within the power of such: So of a Factor, Apprentice, Steward, or Feme that the Husband appoints House-keeper, such things as are within such administration, as to provide for the Family, is implyedly committed to her, 21 H. 7. coming to my use, doth not bind me, unless I have some notice of the Contract; and any finding of either of these consents is sufficient. But beside this, there is something that is no Consent, expressed or implyed, but an Evidence of fact; as if I sometimes send my Servant (without ready mony) to some place where I am known, this is a presumption of fact; but the finding this Evidence, without conclusion that it is a consent, is not sufficient ground for the Court to judge it so. So when they find Entry of Feoffee, and Re-entry of Lessee, this is an Evidence for an Attornment; yet the finding is not sufficient: So the paying Rent to the Grantee, is an Evidence of an Attornment, but not sufficient to find that only. So the finding Legatee, continued twenty years in possession, is but an Evidence of an Assent of Executors, but not sufficient for the Court to judge it so. 3. The Obligation which usually is induced on him that contracts, for nemo tenetur ex alieno contractu, the Heir is charged by Obligation of his Auncester, only by concomitant Assets. And in the Case at Barr, there is no assent of the Husband, nor any express or implyed Contract or Authority given her found, and so no original contract: But here are strong Evidences of both sides; for it's not presumable that the Husband, in case of Cohabitation, will be so unreasonable, as not to allow her to provide for the Houshold; and therefore she is for these things presumed to have his assent. But all this is out of the Case at Bar, because she lives from him, and her desire to cohabit shall not be prejudicial against the Husbands express dissent. It cannot be thought that for every thing in the Family she should have an assent, therefore this is good Evidence, but no more in case of cohabitation. 1. We all agree that this is no contract to bind the Wife, nor any other. 2. It's agreed that the Wife ought to be maintained with Necessaries, which all Laws agree. Though the Civil Law allow the Wife a separate property of her own Estate, yet if she have no portion, she must be maintained by her Husband; other Laws, if Husband will now allow it, Restituantur ali-

Moor 460. pl. 640.

41 Ed. 3. 8. b. pl. 19.

Moor 875. pl. 1224.

30 Ed. 3. 8. b. pl. 10.

48 Ed. 3. 11. pl. 4.

ments

menta ex Sententia Judicis, and this is more reasonable in our Law, which deprives her of all property or means, or capacity to relieve her self: But the difference is, that Plaintiffs say, by an innate original power, given her by the Law, to charge him, which the Defendants deny, but that there is other means to have it; and all agreed that where the Wife contracts for the Necessities of her husband, children, and self, it obligeth him: But this is by the implyed assent of the Husband in it, not from any original power in her to provide; and this assent must expressly be found; and if the Wife, having no mony, do contract for her self, it's the same in case of cohabitation. 3. Though this be a great Evidence of the Husbands consent, yet this is not of its self, being specially found any consent. But 4. however, this consent is countermandable by the Husband, and the Wife may lose the benefit of this presumption by her own default; and such as hold the contrary must maintain the inherent original intrinsick power in her, independent on the Husband, whereby she may charge him without his assent: But I conceive that she hath no such power (though during Cohabitation;) because by the Laws of God, Nature, Nations of England, and of Reason, her Will is subject to her Husband: And to give her an incontroulable Power, is to invert this Order, Mich. 37. Ed. 3 Rot. 34. in the Kings Bench, Day and his Wife, indicted as Accessary by receit to Felony, she moved to Quash it, because at the time of the Indictment she was Cooperta viro, and could not contradict him, for which reason it was Quasht; and the cui in vita, sheweth this plainly: The contrary hereof were to say cui (not ipsa) but ipse in vita contradicere non potuit. 2. Here is no Consent of the Husband, but an express Prohibition to the contrary. 3. Such as assert this power in her, against the Presumption of Law, must make it out: the Sense of all the Books, cited to that purpose, are only, that such Cases are presumptions of fact, or of an implyed assent; but no giving her any Original power of her self to bind him against his assent. The Arguments by reasons, ab inconvenienti, do implie, that the Law was where the least inconvenience was; misera servitus ubi Jus est vagum, and the inconveniences of both sides are to be weighed; As on this side, what should be said necessary, would be a difficult question: And when such things shall be said necessary, as if she throw away Cloaths to day, whither she shall have others to morrow, the Rule of necessities is a wild one, quicquid necessitas cogit defendit; and the power, were these things certain, would be inconvenient; for by the same Law

that enables her to contract, or take up Necessaries, she may take up Mony of Usurer; if that fail, she may sell the Goods of her Husband; if that fail, she may take up Rents; for the provision must be as large as the necessity. 2. Somewhere or other there must be a trust, and the Law generally looks at the ablest; (as the Son is bound to provide for the Father, but no Compulsion, till 43 Eliz. 2. nor is he bound by his Fathers Contract, nor the Father by his; but yet by the Law of God he was bound:) and the Husband is most likely to supply, having the management of all, and his person being at the Stake for all; and he is bound by the most solemn Contract that is in the World; and if against this presumption he will be Exorbitant, the Law hath provided a peculiar Judicature for these Exorbitances by Common Law; as by Supplicavit in Chancery, if he provide not necessaries for his Wives subsistance, Regist. 8. because he doth not bene & honeste tractare; and hereby he is obliged to a reasonable provision, or forfeits his security. 2. The Bishops Consistory, not induced Jure divino, but is a Jurisdiction by the Common Law for these purposes, though the Cohertion by Excommunication be derived from a separate Ecclesiastick Authority; and the Rules whereby they proceed are according to the Civil Law: But their Original Power, as well as that of the Admiral, is given by the Common Law: The Consequence of this Sentence, is as terrible as any in the Law, as a disability to sue, and the Imprisonment of his person. An Infant may bind himself for Conveniencies, as well as Necessaries for himself and Family, which the Law hath given him Authority for to do, to bind himself, for none have any trust of his personal Estate: But here she is to bind another, that hath all the property in her Estate; and the coming of goods, bought by her, do only come into the Husbands use, fictione Juris, but not in reality nor with his consent, and therefore no Trover and Conversion lyeth for the same Argument may be used of other Conveniences, for if one deliver goods to a Feme Covert knowing her to be such, it doth indeed transfer the property to the Husband, but its at the Tradesmans Peril without consent of her Husband, (so to an Infant knowing him to be so) 21 H. 7. 40. is not at all against this Case, but for it there being no delivery, and by this reason the Infant may take up any superfluities, which would be a great inconvenience, if thereby he might charge the Father in Trover. But 2. Admitting that there were such an intrinsick power during Cohabitation, yet the finding of Necessaries here is defective, it not appearing whither it be absolute or relative,

3 Cr. 583. Mackerell *against* Bachelor, and Ive *against* Chester 2 Cr. 560. pl. 8. which must appear certainly, the question being, whither necessary or not; because the Court is Judge thereof; 13 Ass. 31. it is either of Food, Cloaths, Medicine, or Habitation, none of which are found; they have found it necessary and convenient to his degree but not to his Estate, which ought to be; but he laid no stress hereon. 3. Admitting all this, yet by her departure the Evidence of an Obligation ceaseth, because as here found, she went away against the will of her Husband, which must be presumed in malam partem; and provision, during Cohabitation, may be more convenient, cheap, and advantagious; therefore to allow her to forsake her station, to set up a distinct Housholds, is unreasonable. So Baily that hath absented four or five years, shall not be allowed his auncient liberty to charge his Master on his sudden return, without new reteiner. 4. By her desire to return, the Husband by Ecclesiastick Coertion is bound to receive her; and if he do not they may give Alimony without separation, as Seymors Case, Moor 874. pl. 1219. notwithstanding she depart without his assent. 5. This Prohibition doth infallibly take away all presumptions of consent, so that she cannot charge him as his contract; and her inherent power cannot be so great, but he may discharge it, quoad any particular person, as 12 Ed. 4. 18. grant to 20 to be exempt from Juries, is good; contrà to a whole Town, and that would be naught if there be no more in that Town then 20. 2 Cr. 596. Broad *against* Jolly. Obligation not to use Trade in Dale, is good, because it abridgeth not his whole power, and he may have many reasons; as of hard usage, enmity, &c. to forbid some, this is not against our Laws but ease for all Tradesmen.

Bridgman Chief Justice of C.B. for the Defendant, held the Prohibition of the Husband not material, but agreed he might Prohibit this, or that man, but the Authority is only presumed; but where the power is intrinsick in her, and created by Law, he cannot prohibit, actus legitimi non recipiunt diem nec conditionem; for the Jury have found the sale for reasonable price, but having found no contract, but Evidence, this Prohibition signifieth nothing. 2. Its the Phrase of the Law in Forth and Hemblings Case, that she hath no Will, so the Cui in vita; and that she hath no Power, F. N. B. 80. the Supplicavit supposeth: If Feme as Feme of J. S. acknowledge a Fine, it Bars her not: All agree, that for Necessaries for the Family, she cannot charge him, but only for her

her self: her contract is like that of a Servant, and the Necessaries for her family, and her self, differ not; he is as much bound to defend her, as to preserve her, and yet if he will not bring the Action, she hath no remedy for Slander or beating, &c. And if the Law had made this a good contract, it would as well have enabled the Mercer to bring the Action against them, declaring specially, without the circumstances in this Case, Also the same Law that would have given her this power to charge him, would have enabled her to retain; and he may hinder her from taking up more clothes, when he hath taken away the former, by keeping her at home, which is no ground of Supplicavit, unless he confine her to her Chamber, or menace her, de vita vel membro, the inconvenience would be great, which must be provided for in Parliament, where the Law is known; but where doubtful, is an Evidence the Law is otherways. She may as well demand Alimony for all the time of her absence, as since her desire to cohabit, according to the rule, that her inherent power is such that she may charge him so, be she good Wife or bad, be it her fault or his, still she shall be maintained, though she sell Necessaries one day at under rates, she may the next take up more: But if she will not return with the Prodigal, it is fit she eat Husks with him, and not he demittere auriculas ut iniquæ mentis Ocellas. The Law hath left Chastity, Matrimony, &c. to other Laws, meerly because of its decorum. And because to make Juries Judges hereof, would imbitter their Spirits, and they can only find the matter, without giving any correctives or medium of Reconciliation, which the Bishop may. 2. Here is a congruent, full, and adequate remedy provided by the Ecclesiastick Law, which is part of the Common Law, and have the proper conusance of Alimony, 24 H. 8. c. 12. this being part of the Contract matrimonial made in facie Ecclesiæ, where he endows her of all his worldly Goods, Lord Zouch and his Lady, 1583. he was compelled to allow her. Artic. Cleri, and Caudries Cas. 5 Co. 9. Do but mention some, not all Ecclesiastick Causes. Its objected, That this is on suit propter sævitiam, where Divorce is saught; but not Originally, as Register 34. But this is mistaken; for the Libel for want of Maintenance is propter sævitiam, but the suit doth not always end in separation, although the wife desire it. Where its only privative sævitia, though where its positive it may: Hence followeth the Error, that one cannot sue originally for Alimony, for it may be demanded as the principal Suit: and 14 Ed. 4. 10. pl. 8. per Callow, may be as well intended concerning Marriage, as of it

it, F. N. B. 44. Prohibition 21. 28 H. 8. 13. For she may sue for her goods in specie on divorce, as well as for the value or her portion in mony. So in many other cases, as on striking Clerks, not repairing Churches, &c. they give expensæ litis, which is but damages on original Suit. 3. The Bishop hath a better way to examine these differences in his private Audience, betwixt him, his Chancellor and Register, and endeavoureth reconciliation, and alloweth Alimony, according to either of their demerits; all which circumstances are wanting at Common Law; and the Judge there, pendente lite, will allow her maintenance by Sentence, and she may borrow of her Friends till Examination, which is better than of the Mercer. The default of the Wife doth not extinct Alimony, but doth suspend it, and diminish it; they will allow her, though divorced, Stanf. 140. but it shall be only such as to person attainted in quality of a Penitentiary, not according to the degree of her Husband. The Verdict sheweth how improper the Cause is for Common Law, for they find no cause of departure, nor of the Husbands refusal, 2 Inst. 435. Margaret de Camos Case, placita Parliament. 231. who, without her Husbands consent, departed, and married J. S. on Writ of Dower brought, and her purgation made before the Bishop, that she did not commit Adultery, yet because she departed, she was barr'd her Dower, Mag. Chart. 7. The Quarentine, whether allowable at any time, yet she shall not have rationabile estoverium in the mean time, if she depart and come again, Hub. 153. Dy. 76. And her desire to return is not sufficient, but she must make satisfaction to the Church, having committed assault, and ought to give cautionem pignoratitiam, F. N. B. 63. H. or fidejussoria, or Juratomina the last she having none of the other, she must give by purgation; and hereby though she shall not be restored in integrum, yet she shall be restored to the condition of a Penitent, and the Bishop may the rather be presumed here to do right, because he doth it not in his ordinary course, but by peculiar Audience: For Authorities, he conceived none in Authentick times, 11 H. 6. 30. per Martyn, is not against this, but for us; if there be any in it, it is only if a Feme apprompt. i. e. borow of J. S. mony, which all agree she cannot do, however she imployeth it; and though the apprompt. is not said of mony, yet it is so meant, by reason it is said He is bound to repay it, &c, and yet his Opinion is good Law, That she hath general Authority to take up by presumption of Law, 2 R. 2. Statham 65. Debt F. 2. which is seldom specially mentioned, which if she exceed, he is not chargeable. For Authorities positive with me, there are many.

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besides general Rules of Law, that she cannot bind him, F.N.B. 120. 1 Inst. 112. And the Exception to this Rule ought to be proved: and Dy. 234. Points Case, taketh this pro confesso, which is stronger than an express Judgment of a point before doubtful: For the doubt was, whether the payment by the Husband of the Taylor were not an assent to the Mercer, all agreed that without assent he was not chargeable, and that the things were necessary: And this was a Special Verdict found in turbulent times, which (with all reverence to the persons) are not to weigh with us now, no more then their judging of Legacies in Action upon the Case, or their burning Piers on the hand, &c. These were when the Spiritual Courts were down, and when the Judges thought to make a Virtue of Necessity: And her buying for the Family, or for her self, is a presumptive Evidence of an Authority in fact given by the Husband, but no binding Evidence; for the Husband may shew that he had Steward at that time that bought Wares for the Houshold; and this difference, Dr. & St. 138. 2 R. 2. Statham, Contract Br. 4. 39. & 21 H. 7. 4. compared, doth warrant: But the Authority of a Servant must be proved at least by good Circumstances. The Objections, 1. That the Husband is bound to maintain his Wife; this is not by the Common Law, but by a Superior Law of God, Nations, &c. Also at least not by it, as distinct from the Ecclesiastick. And, 2. when the Husband goeth beyond Sea, and provideth not for his Wife, it's a presumptive Evidence that he left Authority, but no full assent. 3. This Necessity is not inevitable, but only suitable to the Husbands degree, viz. convenient: And were it so, yet as in case of a Child wounded, if Servant goeth for a Chirurgion, who cureth him, this binds on presumption of contract in fact: So of the Wife; for had the Husband been at home, and sent to another, and forbid him to have brought, he should not have been bound by the cure of him that he forbid: But yet there is more reason for Fathers to provide for their Children, than of Husband for their Wives, because these have remedy in Spiritual Court, the Children none before 43 El. And the pawning of Ship, Hub. 11. Bridgmans Case, is by Civil Law, not by ours: Saver defalt 37. 1 Inst. 32. An Ideot may contract Matrimony, but not for Goods after Office found. Infants are not liable for their Schooling, if under Age of discretion, nor if above, because put out by their Parents or Guardians, 1 Inst. 112. 21 Jac. 24. The defects that are alledged in Process Ecclesiastick have been in all Causes from the beginning, and must be amended only by Parliament, 1 Inst. 133. If the Defendant will

will lye in prison, or go beyond Sea before appearance; or if he appear, he may make away his Estate before Judgment, and then no remedy before 21 Jac. 24. And as it is not reasonable to presume these, so of the Process in the Spiritual Court, these are postulata, which cannot be argued: It's not presumeable that H. will lye in prison, and stand separate from all comforts of life, and company of others, rather then allow his Wife. And 21 Jac. 24. only provides for new Execution after death of the party, but supposeth it sufficient during his life: So because many have confessed Felonies, rather then pay their Debts, yet it's not to be presumed all will do so. 4. No Action of Trover in this case will lye against the Husband and Wife; it was long questioned, before setled, that Trover lay on Baylment until Moor 841. Isaac *against* Clerke, not setled: And now because the Circumstances of the thing delivered are altered, as when H. denyeth Goods, he taketh them as his own, which the deliverer was ignorant of, and intended not; but here is no ignorance of the fact, but only of the Law, which is not helpt, as cloathing an Image, 34 H. 6. 11. 11 H. 4. 31. pl. 57. thinking it only for Ornament, and that he should have them again: So where Monks had cloathed the Son of J. S. in hopes to make him a Monk, on the Fathers re-taking him, the property of the Cloaths is in the Son. But admitting Trover would lye, she should hereby charge herself as well as him: Also after one Trover, no other will lye by the same man, but Action upon the Case he may have in infinitum. The Act of 13 Car. 2. doth suppose that 17 Car. 1. neither had, nor could take away the power of the Ecclesiastick Courts: And we must judge according to the Law now, not as it was mis-interpreted before.

Siderf. 104. pl. 12. Hall *against* Hammond.

Tuesday, February 3. (36)

YOu stole the Shutters of my Window, by Jones in Arrest of Judgment, is not actionable, being as Barrs of Windows, 1 Cr. and intended as part of the Freehold. Twisden would not doubt, were it Thou art a Thief, and hast stoln, &c. But though it were per quod he was in danger to lose his Goods; and barrs of Doors may be taken down, and set up again, yet because they pass with the Freehold, it is no Felony to steal them: The Court, Windham absente, inclined the words not actionable. Adjornatur.

A Replevin lyeth of the door of a House, *Avowry, Fitz.* 102. therefore it's not parcel of the Freehold. 2 Cr. 442. pl. 6. 2 Cr. 204. 1 Rolls 84.

Siderf. 105. pl. 13. Brian *against* Fitzharris. Ante.

Tr. 14 Car. 2. Rot. 1353.

(37) Error. WIld in Erroz assigned defect in the Count, in that the delivery up of Bond, which was one part of the Consideration of this Assumpsit, doth not appear to be made within the Jurisdiction of the Inferiour Court; but this being but inducement, and the forbearance to sue any Jesuit coming from Spain the chief promise and consideration, the Court held that ill enough, but conceived the other well, because, though this promise be not to sue, &c. made within the Jurisdiction, yet the breach or performance must also be proved, which cannot be here in Inferiour Court, though promise in B. R. to forbear Jesuit, be good enough. Also if one clamando debitum, not saying within the Jurisdiction, bring Action upon the Case on Assumpsit in consideration inde at D. within the Jurisdiction, its ill; so in consideration quod H. sursum redderet Bond made out, or Lands lying out, A. promise within the Jurisdiction to pay, &c. it's ill; contrà on promise sursum reddere. Adjornatur.

Hooper *against* Manucaptors of Gibbon.

(38) Bail. H. Cannot render the Principal at the day of the Return of Sc. feci, per Curiam, and the Bail, as taken, being named a Barber Chyrurgeon, He pleaded Nul tiel Record, and the name of Bayl was H. generally in Sc. fa. in Trespass, it is against him, and on Nul tiel Record, per Curiam, it's no Variance.

(39) Bail. NOta by Jeakill Secondary, and the Clerks, in debt on Bond for performance of Award or Covenants, if mony be awarded or covenanted to be paid of value, they require Special Bayl; else if it be to do any act that in it self is uncertain, as to have Trees, &c. only common Bayl is requisite.

Bathurst

In Error, Br. 186. Bathurſt *againſt* Coxe.

Mich. 14 Car. 2. Rot. 783.

IN Debt for Fine aſſeſſed ad Curiam viſus frank. plegii & Baronis, for that the Defendant put on his Hat in the preſence and contempt of the Lord and Court, and ſaid He cared not what he could do, and hindered the buſineſs of the Court, & male indecore & inciviliter ſe geſſit; for all which one Fine was aſſeſt generally. The Defendant demurred ſpecially for inſufficiency of Count in the words Contempt and Incertainty, for which Cauſe the Fine was. But, per Curiam, it is well enough; for though none of the Cauſes alone would be ſufficient, yet all are: And to ſay in Court of Record, That he cared not what they could do in contempt, is finable. 2. It was aſſigned for cauſe of Demurrer, that it's ſaid ſuch a day the Lord was ſeiſed, and the Defendant reſident, and that infra Menſem Michaelis he held a Court, Kitch. 44. & quod ad tunc & ibidem, the Defendant in contempt, &c. which is not ſufficient. But, by Jones for the Plaintiff, though the Steward muſt enter the certain day, yet he need not plead it. But, by Twiſden, they ought to plead it, for Continuances cannot be ad proximam Curiam, without day certain, though the holding it within a Month be ſufficient to maintain Cuſtom, or 9 H. 3. 36. or 15. Adjornatur. (40) Leet. 3 Cr. 245. pl. 3.

Siderf. 105. pl. 14. Vernon *againſt* Alſop. Ante.

THE Court held the Condition repugnant and void, and the Bond ſingle. Judgment for the Plaintiff, Niſi. (41) Obligation.

Robins *againſt* Hayman.

THE putting in ſpecial or common Bayl is in diſcretion of the Court, and therefore on Suggeſtion that the Executor had waſted Goods, or that he never adminiſtred, or ſuch like, if probably the Debt may become his own, the Court will force him to Special Bayl, by Twiſden: The Court ordered reaſonable Bayl. (42) Bayl.

Copt *against* Coxe and White Administrators of C.

(43) Administrators. IN an Action upon the Case against them, one only is taken by Bill of Middlesex; and Allen moved to stay pleading till the other be Arrested, or come in, 9 Ed. 3. 3. being understood of such as come in by Capias on Original or Utlary, not that appear on Bill, &c.

Huis *against* Binks, Attorney B.R. and Jobson Attorney of C. B.

(44) Priviledge. PRiviledge was prayed by B. of B. R. for both, which is not allowable per Curiam; but they were ordered to plead in Chief.

The King *against* Wallenger.

Wednesday, Jan. 4.

(45) Amendment. IN an Information of Perjury, amendment agreed by Rule of Court to be, but was entred only on the Original Information, not on the Plea Roll, or the Nisi prius; and after Verdict, per Curiam, being only found the mistake of the Clerk in transcribing that Record transmitted out of Chancery: Twisden absente, its well. 2. All the Interrogatories are confusedly jumbled together; and it appeareth not in which of them the Perjury was, and so not material to the Issue, 3 Inst. 164. But by Wild for the King, on 5 Eliz. it is necessary to be pertinent to the Issue. But by Windham, it need not appear so on the Record, but on Evidence at the Tryal; and when the party is found Guilty, it shall be intended pertinent. But at Common Law, H. may be perjured in any material Circumstance, so it were in Judicial Proceeding, which the Court agreed, as in an Affidavit of matter Collateral. Adjornatur.

Siderf.

Siderf. 107. pl. 18. Felgate *against* Mole.

Mich. 14 Car. 2. Rot. 618.

(46) Treſpaſs.

AFter Judgment againſt Principal, and Election made to take Execution againſt the Bail, he ſhall not, as 2 Cr. 320. Higgins Caſe, Return again in their default unto the Principal: And in Scire facias againſt Principal, he pleaded in Bar a Fieri facias of part againſt the Bayl. The Plaintiff Replies Nul tiel Record of Judgment againſt the Bayl. To which the Defendant demurred, as being only Argumentative, 1 Cr. Kelland *againſt* White. 2 Cr. Thornie *againſt* Laſſells. Juſtification for part, not ſaying any thing to the reſt, it's all void: Alſo by recovery erroniouſly againſt Bayl, the Principal is not reverſible, becauſe not dependant on it, as 26 Ed. 3. 75. 7 H. 6. 47. 4 H. 7. 11. Cited in Druryes Caſe Wild for the Defendant, H. may levy part by Fieri Facias againſt Bayl and part againſt Principal, & contrà, which Windham and the Clerks agreed: But after Capias taken againſt Bayl, One cannot reſort unto the Principal. Alſo the Defendants Plea is ill for part only, being levied, he pleaded quod Executio non, &c. without ſpeaking any thing, as to the reſt not ſatisfied, which the Court agreed ill. Judgment for the Plaintiff, Niſi. Wild cyted a Caſe, That after Rule of Court to vacate Judgment, Treſpaſs lyeth againſt H. that taketh Goods in Execution, Vide Ante.

In Demurrer, Br. 12. Coo *againſt* Carthorn. Ante.

(47) Common. Siderf. 106. pl. 17. 8 H. 6. 7. b. pl. 16. by *Martin*. 3 Cr. 147. pl. 9. ſo ſaid.

IN Action upon the Caſe for Common, The Defendant pleaded that he was owner of the Soyl, and digged a pit of Coals, doing as little Damage as could be, and leaving ſufficient Common. On which the Plaintiff demurred, ſpecially as amounting only to the General Iſſue. Jones for the Defendant, Anciently it was uſual to move the Court on ſuch matter, but ſince the Statute of Demurrers, if this be ſhewd for Cauſe, one may demur. But this is intended of matters of fact, not where mixed with matters of Law. As is Eſcape, H. may plead Not Guilty, or freſh Suit, which yet is ſufficient to ſupport the Iſſue; ſo H. may Juſtifie for Heriot. But by Lindely for the Plaintiff, Sale in Market Overt is matter of Law, whither it alter the property, ſo Severans of nine from the tenth part; yet on demurrer, it was held it was but general Iſſue, 2 Cr. 165. Jones *againſt* Williams,

Juſtification for Heriot good, and traverſable, 18 Ed. 3. 23. pl. 4. ſuch ſale is a good plea without colour, by *Fairfax* in 12 Ed. 4. 12. b. pl. 3.

liams, which Windham agreed. And in Action upon the Case, the Plaintiff having averr'd the loss of his Common, if the Defendant plead any thing Cross to it, he must plead Not Guilty, and so take advantage of it; otherways in Debt; which the Court agreed. But by agreement, a full Issue was offered to trye the right.

Dism, Br. 11. Thursday, Jan. 5.

(48) Tythes. WItherington prayed Prohibition to Durham, on Suggestion of payment of Fish by Custom, and so of a Toll of a Mill, which the Court doubted; contrà on Custom to be discharged of Tythes, that because they will not allow such discharge, but the other Custom they will, and so the Court only staid proceedings, till Suggestion drawn.

Adjornatur.

The King *against* Thurston.

(49) Coron. HE was Indicted of Murder generally of one Rowe in Suffolk; the Jury find a Special Verdict, that before the Indictment in 1659. A Writ of Cap. ad sat. Issued out of the Upper Bench, at the Suit of Hains, on which the Sheriff made a Warrant to Prowd to Arrest the Prisoner, who on the 30 of May, 1660. Arrested him, and the Prisoner going to the Goal wounded Rowe, so that he dyed; and if this be Murder, then pro Rege; if not, but Manslaughter. Jones for the Defendant, Had the Act of Judicial Procedings never been made, this had been void, 9 Ed. 4. 1. b. pl. 2. and not like a King, de facto Usurp. in which no Act of Judicial proceedings were made, only 1 Ed. 4. But this Stile and Title, the Keepers of the Liberty of England, and Upper Bench, The Law takes no notice of. But the greater question is, 2. Whither the Act of Oblivion by relation to the 25 April, which was the first day of the Parliament, makes this Proces good; and he conceived not, being different from the ordinary Case of Relations of Acts to the first day of the Parliament, the Parliament of 12 Car. 2. having not all the Circumstances of a Parliament, and so the subsequent Confirmation takes notice of: for had not the King come and assented to confirm it, it had been no Parliament, and so cannot relate further then the Kings assent, of which the Court cannot take notice. But as the Act for Publick Thanks expresseth that the King took not on him the publick exercise of his Government, till 30 May, and in this only as Prisot

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in H. 6. time, as Judges; and being in Parliament also, this Proces shall not be aided by assisting the Authority of that which was no Legal Power; for this could be no malice against the Law in the Prisoner. Twisden doubted, whither Proces be confirmed as to Collateral Acts, and also whether it extend to other then Proces Executed, not Executory. Windham conceived this Proces dependant; and Killing was surely an offence before the Parliament; and its not like the taking away the Life of an innocent man, which Foster agreed. If one were Burnt in the Hand in the time of Usurpers, its sufficient to debar him the second time of his Clergy now. Adjornatur. Post 456. pl. 51.

The Queen Mother *against*. Ante.

(50) Common.

IT was prayed by her Counsel, that the Defendants might not have time to plead on the Distringas awarded for Damages, as 1 Cr. 281. Gibbons Case, which by Jones for the Defendant, was the first President and much doubted how it should be proceeded on, for the first Enquest is only of Office without privity of the Defendants; and it hath been admitted the Tenants may plead, but the time hath been uncertainly ruled in 12 Jac. 2 Inst. In Malloryes Case it was conceived in Star-Chamber, that Proces against the Wills should be by Original; also on the first Enquest it doth not appear which are the next Wills concerned, and 22 Car. 1. This Court was in doubt whither they ought not to award Scire facias, and did award it: But by Glyn pro Rege had the Distringas as Scire facias in Monsons Case conteined a Scire facias in it self, they might plead; but by Windham, either the Distringas ought to contein Scire facias or a Scire facias ought to be awarded before the Distringas; and its the default of the Plaintiff it was not, which Twisden agreed, so Foster; and by Keeling as amicus Curiæ the Distringas is no Judgment but a Summons, as Distress infinite at Common Law; and in Gibbons Case the parties were received to plead. Adjornatur.

Keeling

Ante 454. pl. 49.

(51) Coron. KEeling agreed a man shall not be hanged by Relation, but here is none, the Proces being awarded in (59) and executed 30 May 60, and made good by the Act of Judicial proces, made before the King came into London by Commissioners which was a mistake and so both sides waived Arguments.

Hooper *against* Manucaptors of Gibbon. Ante.

(52) Bayl. JOnes moved that the Court would not give Judgment, because the Bail had rendred the Principal on the day of the second Scire facias H. 4 Jac. Pledger *or* Fletcher *against* Muffet Tr. 16. Car. 1. B. R. Owen *against* Griffith of Scire feci returned which in these Cases was adjudged sufficient; so if he be entred received the same day, though at the Judges Chamber after the Rising of the Court, its good, because it cannot appear he was received after the Courts rising; but by Windham it cannot be on the day of Return, though before the Sheriff hath actually made his return; and this is the pleading of the render that such a day ante Retornum, &c. and the Sheriff often keepeth his Return long after the day, which Foster agreed; also after Nul tiel Record the Bail cannot take advantage of this Render. Judgment for the Plaintiff, Nisi.

Dormer *against* Aylmer and Wright, Manucaptors of Hamond.

(53) Bayl. ON Original Recognizance by Bail to maintain Writ of Error, which is of a certain sum, and is as Recognisance in C. B. or Chancery, no Capias can be taken out on it (as where the Sum is, as in B. R. incertain, it may,) but they ought to have an Action thereon; and therefore he prayed Supersedeas, this being to prosecute in the Exchequer Chamber: But by Windham, A Capias lyeth on Recognisance in Chancery: and by Jeakell, Secondary, Capias hath always been awarded on such Recognisance to prosecute Error; to which the Court inclined: but advised to search presidents. Adjornatur.

Buxton

In Chattels Br. 11. Buxton *against* Bateman. Ante.

IT was said that after Verdict, the not saying ad messuagium pertinent. is not material, being only an Easement; Yelverton, Woodlyes Case, as Way, or Watercourse; contrà if it were an Interest. 2. Without this Evidence, the Action would be against the Plaintiff, and therefore he should make this using to repair part of his Count; and there is no difference betwixt Prohibition and Action upon the Case, both taking away the Jurisdiction Ecclesiastick, being only by reason of temporal Loss: And this is primæ impressionis; and it may be as well hereafter demanded, whither it is necessary in Evidence, or not, and so Men shall not know what to advise; the constant rule of Law being, that it must be shewd in the Count. And Windham held this defect ill on demurrer, but not now after Verdict; and the difference betwixt Prohibition and Action upon the Case is Evident, the Prohibition being to take the Jurisdiction ad aliud Examen, out of the Ordinary, which must shew Special Temporal Cause. 2. Twisdem ad idem: For the Repairs, the party hath no Interest, but only as Founder, of which the other is an Evidence; and had it never been repaired, the party shall not thereby lose his Seat. Mallet agreed, when the Seat is in the Isle, but otherways when its in the Body of the Church. Foster held the Verdict hath not helpt, this being Default, not of form: But all agreed it had been ill on demurrer, so the first exception: But now Judgment for the Plaintiff. (54) Church.

Vincent *against* Saywell.

Friday, Febr. 6.

IN indebitatus Assumpsit for Non-payment of Mony in London, lent at Cumberland, to return. Allen moved to charge the Venue on the Common Affidavit, but the Court refused it; the Action being brought for Non-payment, though proof of the condition on which it was delivered lay of both sides. (55) Visne.

Dr. Witheringtons Case. Ante.

(56) Recognisance which is a Judgment by consent may be *tret hors des Rolls.* so 50 Ed. 3. 18. b. pl. 11.

HE being Restored, on hearing the Cause by Referrees of the King, Allen moved to withdraw the Record and proceedings, having been so ordered by Delegates of the King, as being Scandalous, which Windham agreed; contrà by Twisden, it cannot be without Act of Parliament, though all parties consented; and so it is impossible any should have Damage thereby, which Foster agreed: But a Vacat may be entred on it, which the rest agreed.

Siderf. 107. pl. 20. Townsends Case.

(57) Apprentice.

SErjeant Holloway prayed Mandamus to Enfranchise an Apprentice presented by his Master, according to the Custom, at the end of seven years at Court-day, before Mayor and Bailiffs of Oxon, they having refused to make him Free, which the Court conceived without president; though hereby they might engross the freedom: As Barrester, if the Bench refuse to call him, in Inn of Court, hath no remedy; so there is no remedy to Elect Mayor, &c. contrà to swear one Elected Secondary to the Clerk of the Crown. Waterhouse remembred one president of Mandamus to enfranchise the Son of a Freeman in Norwich; sed Adjornatur.

The King *against* Williams.

(58) Bastard.

BRamston moved to quash an Order made by the Justices of London, for keeping of a Bastard Child born in Slinfold in Sussex, and there the reputed Father hath given security to keep him, and by Twisden, 18 Eliz. 3. other then the two next Justices cannot make any Order, there being no remedy before the Statute, and London may send the Child into Sussex. Windham contrà; that the Justices of Peace, in Case of Exigence, might provide for them, and not the Spiritual Court; and 18 Eliz. 3. was only made to Order and Regulate the manner, which may be extended by Equity unto any Justices into whatsoever place he removeth, which the Court agreed: And the party having removed into London, with the Child, the Order is sufficient though it were to pay 15 l. Arrears of 3 s. per week, Ordered in Sussex, and to give Security to pay for the future what the two next Justices think fit; here being not only a contest betwixt the Parish

2 Inst. 381. March. 41. pl. 28.

Parish and the Defendant; as to Bastard, but for his Misdemeanor, in refusing necessary Maintenance, for that Cause the Court remanded him, and confirmed the Order.

Shepherd *against* Wakeman. Ante.

(59) Slander.

THe Communication of Marriage is laid apud. E. and the writing no where, but the Publication is said ad tunc & ibidem; which by Windham, is well enough: The writing by whom, or where, is not material; but the publication per quod she lost Marriage, which Foster agreed. And by Twisden, in Action upon the Case for selling Horse, 1 Jan. at A. & quod postea, he affirmed it to be his, whereas he was the Horse of J. S. which after Verdict, was held well enough without time or place, and shall be intended all one day. Judgment for the Plaintiff.

Win *against* Lloyd. Ante.

(60) Error.

FInch assigned Error to reverse a Common Recovery in the Great Sessions of Beaumorris, wherein on removing the Record, cum omnibus ea tangentibus, it appears in the quod ei deforceat, in nature of Writ of Entry at the Common Law, the Commission to take Warrant of Attorny of Vouchee is teste before any appearance of the party himself, and that the Caption of Warrant of Attorny to take Warranty of Win, is Teste before the Commission; Win Vouched over the Common Vouchée, and so a Writ of Seisin awarded and executed were ill: 1. That this Recovery against Vouchée by Attorny is Error, and no intendment can be of any personal Appearance, because the person is said to be infirm. And that this Commission is void, appears in that it recites (although teste before) the Summons and Voucher; but he agréed that such Commissions may Issue before the Return of the Summons, Littletons Case 5 Co. 47. b. 1 Cr. 11. Arundels Case; as Dedimus betwixt Teste and Return of Writ of Covenant; but had the Teste been before the Writ of Covenant, it had béen void; so in Dy. 225. Mich. Bacons Case. But were the Warrant good, yet, 2. the Caption of it is ill, being dated before the Commission it self; nor can this be ayded by Intendment, however great favour be to be had of Common Recovery, yet magis amica veritas. 1. Because the Writ of Error commands to send up the Record, Cum omnibus ea tangentibus, which are returned as all. 2. It appears by the Recod, that the

Plea was betwixt the same parties to the Writ, the same Attornies, &c. and therefore were there any other, the party should have alledged Diminution, 1 Cr. 327. Johnson *against* Davies. After Verdict in Ejectment, Variance betwixt Count and Writ was supplyed, as if no Original had been: But this the Court might safely intend, that the Writ was lost, but not so in our Case; for if there be a better Warrant, its against the Record it self, Mich. 14 Car. B. R. Herbert *against* Binion, depend from 14 Jac. 2 Cr. 392. Error to reverse a Fine levied in Mongomery, the Ded. potestat. was dated 2 Jac. and the Writ of Covenant was 7 Jac. which was agreed Error, unless the Court would intend another Concord (as one taken at the Bar) which was held by Berkly and another well enough; but contrà by Jones and Bramston, Dy. 330. not entring Warrant of Attorny on the Rolls of Attornies is Error; and the Court must as well intend this, as that there was another Concord, 5 Co. 54 b. Gages Case is false reported. And in Sir Nich. Chamberlans Case it was held, that the Fine was not amendable, but reversed. Williams for the Defendant, H. Wm Brother and Heir of Robert, Vouchee in the Recovery, and not only the proceeding in order to the Recovery, but the Recovery it self is certified, wherein Robert is said to appear, and make Attorny, as the usual form generally, and the Warrant entred on the roll, after the Recovery. As to the Error, its as the rest, only assigned in the proceedings in oyer to the Recovery, and contrary to the Body of the Record of the Recovery it self, and therefore such averment of date, before the Summons, is not to be received, no more then to say there were no such Judges as those before whom the Recovery was suffered 3 Cr. 531. Huberts Case, Yelverton 33. Arundels Case. It could not be intended that Dedimus was taken before R. Knight, and Caption before R. Gent. But if this averment be admitted, yet all the parts of the recovery necessary are substantially good, and the misprocéding or misentry thereof will not vitiate that the Dedimus is Teste before the Summons, is not sufficient to reverse the Recovery, being no part of it, or not so substantial as that disorder in it should reverse the Judgment, but is Jeofail within 27 Eliz. 5. and this is the common practice in all Courts at Common Law; no Fine or Recovery was by Dedimus, but by 15 Ed. 2. p. 81. Stat. Carlile, 2 Inst. 512. introduced, which Statute was made in favor of the parties that levied Fines, and they might trust any other persons, as well as Abbot or Knight, &c. and the Court may refuse the Caption by vertue hereof, at discretion, and this

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is only an accident, 5 Co. Teyes Case, and Dormers Case not there recited on recapitulation of all the parts of Fine; and the Chief Justice of C. B. 2 Inst. 512. 1 H. 7. 9 Dy. 224. may out of Term, without it, take a Fine; and its but only ad informand. Conscientiam Judicis; and on general Commission to take Fines, the Judge may take any Fine, without particular Commission; and these Objections had been most proper below, when the Recovery on such averments might have been staid, but shall not now be reversed for it. 2, Though it were an Essential part, yet this misentry is amendable by 27 Eliz. c. 9. which helps all misentries of Warrant of Attorny, like Jeoffail, Venire facias 1 Cr. 38. Teste before the return of the Original, and more usual to amend it, then Teste of Original, which is frequent, as Gages Case cites 3 Cr. Also the Constant practice is to enter Recoveries thus, and greater mistakes then these have passed without any scruple, as 5 Co. 40. Dormers 4 Ed. 3. 62. as an Advowson demanded by real Writ, held well enough; so Common Recovery against Infant by Attorny, 22 H. 6. 31 Dy. 363. 1 Cr. 307. its well enough; yet the Infant cannot neither make, nor be an Attorny: So 3 Cr. Holland *against* Jackson, and 2 Cr. 77. the Earl of Bedfords Case the Court would not hear Variance betwixt Caption, and Body of a Fine; so 3 Cr. 255. Argentons Case. The same exception to a Fine; as here to a Recovery, and overruled: And the Course of Proceeding and Entries is at Grand Sessions in N. Wales, as here, that Judges may take Fines in their Chambers without any Dedimus: But though the Dedimus and Warrant taken by virtue of it, be void, yet the General Warrant of Attorny entred in the end of the Roll of the Recovery, is sufficient: For the party notwithstanding Dedimus taken out, may Waive it, and appear in person; and so it may reasonably be intended here, the rather if the Warrant on the Dedimus be void or inconsistent: So is Arundels Case, Yelverton 33. expressly: The Court to support Recoveries, 3 Cr. 389. Martin *against* Leaver, will intend sometimes against Grammatical Construction of the Fine 2 Cr. Champernoons Case: The Caption is no part of the Recovery, but penally required by Statute. Twisden agreed, the Dedimus no part of the Fine, but the Warrant of Attorny is part of the Recovery: But the date of it, by Windham, is not material. Adjornatur.

Siderf.

Siderf. 102. pl. 8. Goodier *against* Clerk. Ante.

Saturday, Febr. 2.

(61) Leases. Windham for the Plaintiff, according to the latter Judgment (against the former, and contrà to which he had argued before) that the Lease for 100 years Habendum from the death of William without Issue Male living, the words may serve to either sense; and that which Guids, is the intent of the parties on the Settlement, which is the Rule in all doubtful Constructions: And here it was to provide for Issue Female, on failer of Issue Male, as is usual in London. And this way hath been found out, because on Limitation to the, 1, 2, 3, and 4. Son, Remainder in Trustees for 100. years, the Son Tenant in Tayl may defeat all; therefore is it usual to begin with such a Lease, which by a Subsequent Conveyance, cannot be altered by any Issue: and if no intent appears, it shall be intended strongest against Grantor, and so shall rather begin late, then never. Lease to begin on Death of J. S. without Issue, that must begin on the Death; but here the Habendum being from the Death of Baron & Feme, without Issue of their Bodies, it may begin when Issue fail; the rather, because Collateral Line is to take, and the benefit of the assurance, which was to William, and the party to it, and so the trust goeth along with the Remainder, as was held in Equity, after portions paid, in the Case of Bret *against* Bridman. The Plaintiff, as Executor, sued in Chancery for Breach of Covenant made to Knightly to repay Money by an agreement for Marriage Portion, on Death of the Wife, within two years, without Issue of her Body: She dyed, having Issue, which dyed within the time without Issue, adjudged the Father should have nothing back again by four Judges, and this Cause was carried on the same point, but on different intent. So the Case in 1 Leond. 285. pl. 387. if H. dyed, having no Issue, then, &c. he had Issue, which after dyed without Issue, and adjudged the Lease should then begin.

2. Twisden ad Idem, Its as good as gift in Tayl, Remainder for years: But such Lease, Darrants Case, cannot be made after the Gift in Tayl, nor can this Lease be dockt by Recovery against Tenant in Tayl, being precedent interest, as Coupledicks Case: But this future interest by 21 H. 8. c. 15. cannot falsify such Recovery, being neither Termor, Fermor, or Lessee; nor did the Statute intend such interests by

by reason of the proviso that tyes it to particular interests; but if he could generally, yet when he cometh to falsifie, if it be aver'd this interest was intended to defeat Recovery by Tenant in Tail, he shall not be admited to falsifie. 2. The words Habendum after the death of William and Margaret without Issue Male of their Bodies, meant Issue in legal Sense, and the best Construction shall be for the Lessee, in doubtful Cases, as in the Case of Dy. 261. for every word must have some sense, and the trust is limited to the Heirs of William, L. Co. 113.

Case, which must be such Heirs to which the gift was made. He relyed on Leonard, which he much commended, and he that hath such Lease on Death of A. who hath no Issue at the time, is no forein possibility; and the Case of Bret and Bridman was a plain Bargain on Marriage Portion, and not like this Case. Mallet for the Defendant, Foster for the Plaintiff, the Lease is not precedent to the assurance by Fine, but indorsed on it, and so on the first Covenant to levy it, and so the intent appears to be, that it should begin only on failure of Issue, the most advantagious for the Lessee being to be presumed, where the intent is not contrà to Law, and especially here, the provision being of the Wives Lands, and so concluded the Lease good, and a reasonable intendment in beginning. Judgment for the Plaintiff, Nisi.

Neve *against* Manucaptors of Brion.

IN Scire Facias after Imparlance, one pleaded that there was another not named, which per Curiam is ill after Imparlance; Respond. ouster awarded. (61) Bayl.

Gavell *against* Tasker.

IN Trespass for taking four Carts; The Defendant Justifies by a By-Law of the City, That what Cart soever should be found working contrà to the Order of Common Council (that they should not work without Licence from the Company of Woodmongers) that then they may take and detein them, untill they shall conform to the Government of Woodmongers. On which the Plaintiff demurred as unreasonable, in the restraint of any to let out their Carts, or use them for their own private Goods. Also 2. This is till he conform to the Order, not till he be delivered by Course of Law. 3. This By-Law is the worse, because made by Common Council on behalf of Woodmongers. 4. This By-Law is to take and seise such as they find working; and here the seisure is laid after the day of working. The Court conceived (62) Trades.

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the Common Council may depute Woodmongers to make such By-law for the good of the City. Adjornatur.

King *against* Taylor. Ante.

(63) Slander. By Windham, if H. writes a Letter to Thieves, whereby I am civilly used, an Action upon the Case lieth, which Twisden agreed, à Fortiori, here being a Counterfeiting of the Plaintiffs Name, and special Damages laid. Judgment for the Plaintiff. Nisi.

Gibs *against* Taylor.

(64) Legacy. In Debt on Bond, Condition to save harmless from all Damage that may hap to the Plaintiff by non-payment of Legacies, being Executors of J.S. The Plaintiff alledged Damage in suit by Legatee in Chancery; to which the Defendant Demurred. Judgment for the Plaintiff, Nisi.

Chorls *against* Calvert. Ante.

(65) Trespass. In Action of Assault, Battery, and Wounding against 10. who Justifie, and Issue on Replication de injuria sua propria, the Jury may find 2, 3, 5, or more, or fewer of them, Guilty, well enough: Also the Defendant shall not take advantage of his defective Bar, were it so, the whole being put in Issue by the Replication, but by Windham, the Quoad residuum transgr. & insult. Not Guilty, goeth to the whole, as well the wounding, as the rest, to which he pleaded quod molliter manus imposuit, especially the Replication putting all in Issue; which the Jury find quoad some, that it was for Cause, and that the rest did it not for Cause; which is well. Twisden ad Idem, the quæ est eadem transgressio doth not help the defect in not answering the wounding; for the Court seeth its not the same: But by the Replication the Cause was only in question, which they plead for their molliter manus imposuit. Foster ad Idem, The Verdict finding only, as Frestons Case, Hub. the Substance of the Declaration, The Defendant for his ill Plea shall not have benefit of it. Judgment for the Plaintiff Affirmed.

Bathrist

Bathirſt *againſt* Coxe. Ante. In Error Br. 186.

IN Debt for Fine in Court Leet, for contempt, in putting on his Hat, and ſaying, He cared not what the Court could do, and that he was thereby hinderd in his proceedings, which the Court ruled good cauſe of Action. 2. The Court ſaid not in what capacity the Defendant was fined, the Court being Leet, and Court Baron: But per Curiam, this ſhall be intended in that Capacity which is able to do it. 3. There is no day of the holding of the Court, but only infrà menſem Paſchæ generally, but it being that 8 Die oct. the Lord was ſeiſed, and the Defendant a Reſiant, quod ad iſtum eund. Diem, ſcil. 8 Die oct. ad Curiam viſus fr. plegij tent. infrà menſem Michaelis, &c. The Defendant Comperuit, & quod iſto eodem Die, he committed the contempt, this, per Curiam, is well enough, præter Twiſden: But all agreed, that day is neceſſary; Tournum de hoc is the Name of the Court of Frank Pledge held infra menſem Paſchæ, as St. Michaelis Court is of that after Michaelmas. Judgment for the Plaintiff. (67) Leet.

Glaſcock *againſt* Morgan. Ante.

Mich. 14 Car. 2. Dett. Br. 49. Rot. 518.

IN Debt on a Judgment, The Defendant pleaded an Elegit of part entred on the Roll, and no Lands are found, but the Jury find Goods, which are thereon delivered, which is pleaded in Bar to the whole Judgment. To which the Plaintiff demurred, as inſufficient, though he ſuppoſe no other execution could have been, yet the party may have a new Original Action on the Judgment. Jones for the Defendant, 15 H. 7. 15. an Elegit entred on Record, makes the party remedyleſs, 19 H. 6. 4. by Newton, though nothing be found on it, and the Election is not as to what ſhall be the Event, as Hub. 2. 57. but of the manner of proceeding, not of the Land, L. 5 Ed. 4. 41. Pl. 3. 36 Ed. 3. 24. Pl. 48. adjudged the ſame, and that one cannot have Debt, Dy. 299. Pl. it is in the point, that he ſhall have no other remedy, whatever 2 Cr. 338. is; the like Opinion of Coke, though the fruit of Elegit be not had: Therefore the ſafeſt way was not to enter the Prayer of the party on Record, till it be ſeen what may be had. Allen for the Plaintiff, The Conſequence hereof would be to leave the Heir or Executor of him that recovers, without (68) Execution.

remedy, if the Elegit be discontinued; and here the Execution is not Executory, but executed, and hath but the effect of a Fieri facias and none of the Cases like this. And the Court concluded that this is no Election being of nothing.

Oats *against* Thornill.

(69) Obligation. DEbt on Bond, Condition to make all such Linnen as the Defendant should want during his living single 11 H. 4. 25. 16 H. 7. 9. whereby, by Jones for the Defendant, she, the Plaintiff, is bound to find the Linnen. And the Defendant pleaded, that she being required, did not make such a suit of Linnen: To which the Plaintiff demurred. Windham conceived, the intent must guid contracts, and here it appears the Plaintiff is Sempster, and its her proper Trade to make Linnen, and therefore, as Tayler, she is not bound to find the Linnen, which Twisden agreed; but in Action against Shoomaker for not making Shoos, or Goldsmith, for making Bason, they must find the Materials, contrà of Taylor, &c. for such person cannot give in Evidence in Action upon the Case, for not paying him for making his Suit, that he found the Cloaths and Materials. Judgment for the Plaintiff.

Mills *against* Carpenter.

Monday, Febr. 9.

(70) Error. ERror of a Judgment, the Plaintiff assigned Varians to Reverse the Judgment for his own Expedition, the Writ of Certiorari being betwixt Carpenter *against* Mills Chandler, and the Record is Mills Inholder, which being a Trespass, is material per Curiam, and not like the Scire facias against Bail, by name of H. Chandler, &c. and the Conusans was H. generally, Judgment Reversed: but per Curiam, no Record is hereby removed.

Burrel

Burrel *against* Peacock.

IN an Action upon the Case upon Indebitatus within Inferior Court, on Sale of Wares (out of Inferior Court;) After Verdict Windham held it well enough; Sed curia contrà, unless the promise had been actually within Inferior Jurisdiction, but general Indebitatus there is a promise only in Law, and not supported by Verdict, as the other is. Adjornatur. (71) Jurisdiction.

French *against* Pierce.

IN Debt on Bond on Oyer demanded, the Condition was, that if an Apprentice turned over, should waste the Goods of his Master, the Defendant would pay what the Master was damnified, and pleaded nul Dammage. The Plaintiff sets forth breach in wasting Goods, but sets forth no notice given to the Defendant; wherefore the Defendant demurred, because this is Obligation of A for a third person, and it cannot be presumed the Apprentice will give notice of his own wasting, which is to accuse himself. Allen for the Plaintiff, none is necessary, because both parties are in equal Capacity to take notice: Also when any person doth undertake for a third person, he must answer for him at his peril, which the Court agreed, because the Imbezilment is not in the Conusance of the Plaintiff: But by Twisden, the particular of the Goods wasted ought to be set forth, and not to say to such a value, or at least the kind, with one of a sort, with, &c. Sed curia contrà. Adjornatur. 471 pl. 84. (72) Apprentice.

Corporation of Southampton *against* Richards. Ante.

ALlen for the Plaintiff, that Goods and Obligation of felo de se pass by grant of omnia bona felonum; but by particular persons grant of Bona & Chatalla Obligations do not pass; but contrà by the Kings Grant, this passeth an Inheritance out of the King, which was in him by his Prerogative, there being no other description of such grant, Credita being a word not heard of in such Grants: But the Court doubted it, and Adjornatur. (73) Obligation.

Bowler *against* Marshall.

(74) Jurisdiction. ACtion upon the Case quod cum Indebitatus fuit in 40 l. infrà Jurisd. of the Marshalsea, for Meat, Drink and Lodging, &c. not shewing where, promisit infrà Jurisd. Solvere, &c. After Verdict for the Plaintiff, and Judgment, the General Error was assigned: And per Curiam, had the Esculenta, &c. been laid expressly at York, the Action would not have laid, nor shall it now be presumed, by reason of general Indebitatus to be within the Jurisdiction: But by Windham, if it be not pleaded after Verdict, the Court may presume it; but per Curiam, this hath been introduced there only since the new Patent, 6 Car. 1. thereof made. Adjornatur.

Fitz-harris *against* Brian. Ante.

(75) Assumpsit. THe Consideration being mutual Promises said to be made within the Jurisdiction, so the performance of either is not material, by Windham and Curiam; but if any be broken, a new Action must be brought on the Breach, and its not inquirable in the Inferior Court in Action upon the Case for non-payment, according to the promise made to the Plaintiff in Consideration of another made by him, not to sue any of the Colledge of Jesuits, and that he would surrender up Bond made to him by them, which Foster and Twisden conceived no distinct thing, and but all one promise of actual delivery, not as quod non molestaret & quod sursum redderet, &c. only promissory. Adjornatur.

Smith *against* Conyers. Ante.

(76) Rent. IN Action of Covenant on Articles of Agreement to pay Annual Rent ad separales festos, during continuance of Residue of Lease made by J.S. to the Defendant and Plaintiff Joyntly, not shewing what certainty that the Term conteined, nor how many days were arrear, but only assigned Breach for non-payment of 20 l. annually ad separales festos. On Judgment upon Nihil dicit this incertainty was assigned by Allen for the Defendant for Error, but by Turner for the Plaintiff, it appears the Plaintiff and Defendant had a Joynt Lease which is certain enough, the Lease being in the Defendants Custody; nor by Windham is the Term material, be it for Life or years: nor what days were arrear, for it shall be intended every day during the residue of the Term were arrear to

to the quitting of the Plaintiffs Interest, and Recovery here may be pleaded in Bar of any Action brought for Arrears during the Term, and its as well as if Breach had been quod non solvit ad aliqem inde diem, which the rest agreed. Sed Adjornatur.

Booth *against* Leach. Ante.

THou art a Trayterly Rogue, implyeth no Act, and so not Actionable, by Allen, no more then to say You are inclined to be a Traytor, in Error of Judgment in C. B. Curia contrà, that it implieth an Act, and is all one with Traiterous Rogue, which is adjudged Actionable. 3 Cr. 171. Ward *against* Thorn. Judgment for the Plaintiff. Nisi. (77) 1 Roll. 43.

Mould *against* Wallis. Ante. In departure Br. 10.

IN Action of Covenant of Apprentiship, The Defendant pleaded Infancy: The Plaintiff replies by Custom of London; to which the Defendant demurred. Windham conceived it no departure, being no new matter varying from the Count, but that being supposal, and always general, this special matter is a good support; And it would be too prolix for to set forth the particular Custom; As if Alien plead as to Action, I may shew that he is made Denizen; and Godbolt 122. pl. 143. & 18 R. 2. are express in the point. Twisden contrà, that it is a departure, as wheresoever the Count is general, it cannot be made good by any particular manner, as Count on Statute that giveth a penalty, The Defendant pleaded it is repealed; The Plaintiff sets forth, confirmed by another Act, its good; contrà if I Count on Temporary Statute, and the Defendant shew it expired, the Plaintiff shew it confirm'd by the new Statute, its a departure; so 6 Car. Butler *against* College of Physitians, by all the Justices; so Feoffment generally pleaded may be made good by Lease and Release: But in Trespass, if H. Justifie by Lease of Abbe for 60 years, he cannot Rejoyn that its good for 20, Pl. Com. 105. by the Act of dissolution 31 H. 8. So Hut. 63. in Action on 5 Eliz. The Defendant pleaded the proviso is that none that hath 20 l. per annum, can be bound in Corporation. The Plaintiff shews he had not 20 l. which per Curiam, is a departure. So in Tresspass, H. Justifies by Custom to devise, the Plaintiff shews he was an Infant, it cannot be made good by new Custom. Foster held its no departure, the Gift of the Action being laid in London, the Title is the same still, only the person enabled (78). Infant.

bled, 3 Cr. 653. pl. 12. Walker *against* Nicholson, Winch. 63. But by Allen for the Defendant, the Abbot of Buckfaces Case is express, that it is a departure, it being in an Action against H. as Baily generally; the Defendant pleads he was Receiver; the Plaintiff replies, that the Tenants of the Manor have used to Elect Tenant, which shall be Baily to Collect the Lords Rents, and adjudged a departure. Adjornatur.

Tounsends Case.

Tuesday, Febr. 10.

(79) Apprentice. THE Court conceived that a Mandamus ought to Issue to swear him according to a President, 13 Car. 1. in Norwich, where every one by Custom is a lawful Freeman, that hath served seven years; and notwithstanding they refused to swear him, for which Cause a Mandamus was granted.

The King and Justices of Somersetshire *against* Upham.

(80) Peace. THE Court award procedendo on Indictment of Barretry, though filed, having been filed the same day that the Certiorari was returned; which the Court conceived an irregular surprise, notwithstanding the Bar; and the Clerks affirm, that after filing none could Issue.

Baker *against* Westcroft. Ante.

(81) Maintenance. Costs Br. 23. IN Action on the Statute of Maintenance Stroud, on 8 Eliz. 2. prayed Costs, which by 18 Eliz. 5. is not taken away on Nonsuit of the Plaintiff, as to the party grieved. Jones for the Plaintiff, the Action is tam quam, and not special Action upon the Case on Statute by party grieved alone. Windham conceived in this Action Costs are to be allowed; contrà in Information. Adjornatur.

Sir John Cutler *against* Stamp.

(82) Bail. IN Action of Covenant Damages assigned to 30000 l. only for Veration that the party should not be Baild, the Defendant therefore prayed that the Plaintiff should file his Bill before Bail be put in, that so he might pay the Kings fine of Damage Clere, viz. 12 d. in the pound to the Prothonotary accordingly; but by Jeakell, on filing of the Bill, such Bail as is in before is accepted, be it Common or other, and

and by Allen for the Plaintiff, its against the Rule of the Court to file a Bill before Bail put in: But per Curiam, this is a great abuse to put such a great sum into the Writ, though being in Covenant no fine is due, nor in Debt, if the party be committed, and we will force the Plaintiff to take reasonable Bail, according to discretion: And if the Plaintiff after declare on a less Sum they will lay him by the Heels: And the Plaintiff ought to swear the probable Cause of Action to be of such Value. (82)

Eden *against* Spiller and Cole.

IN Scire facias on Reconusance in Chancery to keep Covenants specified in certain Indentures set forth, which was a devise by S. to E. and Redemised by E. to S. rendring Rent at Lincolns Inn. The Defendant pleaded performance. The Plaintiff sheweth, that Rent due at Mich. last is Arrear, and so Breach; which by Baldwin, in Arrest of Judgment, is not sufficient; the Condition being to perform payments in both Indentures, and Breach is assigned only in ultima mentionat', and either in severalty shall not be intended condition; Sed curia contrà; either of them being supplied by the nature of the Covenants. 3. The Issue in Chancery was on Non-payment at Lincolns-Inn Hall generally, and Plaintiff suggesting that Lincolns-Inn was in the Parish of St. Andrews Holborn, prayed Venire facias of the Parish, which is awarded quod Venire Facias duodecim generally, without any place, which is ill, as Rast. Entr. 267. Co. Entries 60. Sed Curia contrà: In Inferior Courts it must appear to be awarded within Inferior Courts, but not so in Superiors: But the Entry may be particular, or generally, Ideo venit inde Jurata, &c. and the Venue cannot be of the Inns of Court, but if any where it should be of Holborn, and shall be so intended, the Action being laid in Middlesex. (83) Rent.

Judgment for the Plaintiff.

French and Pierce. Ante. 467. pl. 72.

TWisden agreed with the other Judges, that no particulars need be shewed, as in Debt against Executors, they plead fully administred. The Plaintiff may suggest that he hath wasted diversa bona, without shewing what. (84) Apprentice.

Judgment for the Plaintiff.

Angel

Abridgment Br. 25. Angel *against* Shaperton.

(85) Damages. Siderf. 108. pl. 22. WIndham conceived the Court may increase Damage, Davies *against* Folial, without any mention of Maihm, within the Count especially: But by Twisden, this is intended on Trial at Barr, or when certified by the Judge of Nisi prius before whom it is tryed, not else. But Latch. 223. Hooper *against* Pope, is without special declaration. But Foster, before whom the Cause was tryed, conceived the damages given 10 l. against a Boatswain for shooting off a Canon without order to be enough, therefore the Court would not increase them, there being no malice or wilful negligence proved.

Bead and the King *against* Heal and Michel. Ante.

(86) Force. WInnington moved to quash an Indictment of Forcible Entry, being quod disseisivit Lessée for years, which per Curiam is void. Quasht.

Gibbon *against* Shepherd.

(87) Bail. ALlen prayed the Plaintiff may file his Declaration, as of this, which was filed as of Michaelmas Term, when Bayl was put in, the cause of Action declared on, being after the Arrest, and tender of Amends was after Michaelmas, and before Hillary Term, before receit of Declaration; but being, as this case is, after the Declaration, is ill, being not according to the Statute 21 Jac. 16. Trespass, &c. The Arrest was in August, Teste the last day of former Term; the Declaration is of involuntary Trespass done in September, which the Defendant could not know till the Declaration came in, which was not till Hillary Term, but relates to Michaelmas. He agreed, had there been any precedent cause, the subsequent may be by the Bayl used for aggravation; but no advantage shall thereby be for original matter subsequent, when none is precedent. But by Windham, though this be an abuse of the Attorney in suing out the Latitat, yet the Court will not file the Declaration of Hillary Term, because the Defendant had neglected to tender amends sooner, which the Court agreed; but ordered the Attorney to attend to clear the abuse. Allen affirmed he had been Counsel in a Cause wherein Bayl were

were discharged, because no cause of Action appeared, but only subsequent to the Arrest against his Client.

The King *against* Hubbard.

INdictment on 5 Eliz. 4. for using the Trade of a Currier, not saying it was a Trade at the time of the Statute, nor that he had not served in any Art, Mystery, or Manual Occupation, but only that he had not served as a Currier, for seven years; both which the Court conceived ill, and quasht. (88) Trades.

In Conusance, Br. 7. Neal *against* Dennis. Ante.

WHen cause of Action appears on the Declaration, 6 H. 7. 9. Conusance is not demandable after Imparlance from one day to another, though in the same Term, by Windham. Also the Prescription alledged tenere placita is not sufficient to demand Conusance from other Courts, but the Bishop ought to make title for cognitionem placitorum by special Patent. Twisd. ad idem, and cited Cases, 4 Car. 1. where Bramston, demanded for the Town of Colchester, and denied, because the Warrant was left at the Attorneys Chamber. Hitcham was denied Conusance, because his Warrant was in English, as here it was: But were the Form good, yet the Matter is ill; for as Done *against* Rogers in Trover for Oats, the Defendant pleaded Conversion was at Chester, yet could not have Conusance, nor can it be demanded in any transitory Action: And 9 Co. Abbot of Strata Marcella, if the Conusance be claimed by prescription, allowance must be shewed in Eyre, or here in B. R. vouching the Roll and Allowance in C. B. is no Allowance here. Also habere cognitionem is not sufficient, without it be Coram quibuscunque Justitiariis, 8 H. 6. 21. 9 H. 6. 35. in which Case it's good only as to C. B. but if in Quibuscunque Curiis, or Coram nobis, it reacheth to B. R. Also after continuance by the Court, Conusance may be demanded, but never after continuance by prayer of the party, 25 H. 6. 54. any may prescribe tenere placita, as many Inferior Courts in Debt or Detinue, 9 H. 7. 11. 15 H. 7. 16. 16 H. 7. 16. Conusance is demandable after the first day, because no certain day is in the Writ, not because they are transitory; Respond' ouster awarded, Foster absente. (89)

The King *against* Spearing.

Wednesday, Febr. 11.

(90) Poor. AYres moved for another Certiorari to remove an Order of Justices and Overseers on 43 El. 2. for placing an Apprentice with a Draper in another Corporation, which the Court doubted they could not, but granted another Certiorari to try it.

(91) Poor. AN Indictment for erecting a Cottage contrà formam Statuti, not saying contrà Pacem, was quasht per Curiam ex motione Rich. but it needed not be said ad Sess. Pacis Domini Regis, but only ad General. Sess. pro Comitat. tent. &c.

Barrington *against* Venables.

(92) Bail. POcocke, Bayl for the Defendant, prayed to be discharged on a Letter of the Plaintiff to the Defendant, that he should manage his Business with his best advantage with his Bayl, who resolved to take him; which the Court conceived a Knavish practice to take the Bayl without the Principal, yet would not discharge the Bayl: But the Court allowed him to plead to a Scire facias, and to remove the Record after Nul tiel Record pleaded, and left him to bring his Action for the fraudulent writing the Letter.

Baker *against* Westcomb. Ante.

(93) Costs. THe Court conceived costs ought to be paid in Action tam quam on the Statute of Maintenance, as the Secondary had informed the course of C. B. was.

Glasbrooke

Glasbrooke *against* Gibs.

THe Defendant joynt Merchant entred Judgment to the Plaintiff, defeasanced to save harmless from all damage of Goods in Schedule annexed, which were parcel of the Brewhouse and joynt Stock, and after acknowledgeth several Judgments to several persons: This, per Curiam, is no damage to the Plaintiff his Companion, till Execution sued out against the Stock. (94) Condition.

NOta pro Regula per touts les Clerks & le Court, That if the Sheriff return but 40 s. which is the usual Issues on Distringas Juratores, the Court on prayer of the party, cannot cause him to return greater, though Jurors be in a far Country, and will not appear thereon, but can only make Rule, that good Issues be returned. But by Twisden, the Plaintiff ought to bring a Writ against the Sheriff, on Averment, that he might have levied greater Issues, and thereon the Court may increase them. (95) Enquest.

DE TERMINO Paſchæ,

15 *Car.* II. *B. R.* Die Saturnij, Maij 6. Anno 1663.

Foſter *Chief Juſtice.*
Mallet,
Twiſden,
Windham.

(1) THE Court refuſed to file Proceedings againſt Bayl on motion of Mr. Needham an Attorney, four Terms after Scire facias brought againſt him on Judgment removed into the Exchequer for Error, becauſe notwithſtanding the tranſmiſſion, the Attorney might have filed the Scire facias, whereupon the Court ordered a new Scire facias, the courſe having been both ways at the diſcretion of the Court. Bail.

In Error, Br. 117. Pierſall *againſt* Smyth.

(2) ON Affidavit, affirming the Defendant dead after Trial, and before day in Bank. Bertue moved to ſtay Judgment, which the Court did, till further motion by the Plaintiff. But by Windham, the Plaintiff may enter it at his peril: Foſter contrà. Twiſden held it in diſcretion of the Court, according to the manner of the Suggeſtion, whether as ami- Abatements. Sidorf. 131. pl. 2.

cus

cus Curiæ, or by bare affirmation of the Attorney, or as here. Adjornatur.

Slyder *againſt* Edwards.

(3) Trover. TRover pro uno Pullo, which, by Williams, in Arreſt of Judgment is uncertain, as Ellis *againſt* Yarwood. And though it were farther ſaid Coloris Bai (intending a Colt) yet per Curiam, that ſignifieth nothing; yet Windham doubted; ſtaid quouſque.

Turner *againſt* Felgate. Ante.

(4) Treſpaſs. JUdgment had in Scire facias, and Execution, and the Mony levied, but after it was by the Secondary reported unduly obtained, there being no Capias againſt the Principal filed, whereon the Judgment being vacat by Rule of Court, Trin. 1656. Rot. 130. or 138. the Defendant brought Treſpaſs, Q. vi & armis againſt the Plaintiff, as Aſſiſtant of the Sheriff, in ſhewing him the Goods, and Recovered Hill. 1658. (which, by Twiſden and Windham was a hard Judgment, and contrà to his) and was ſatisfied; and notwithſtanding that, cauſeth an Entry on the Roll that he ſhould have Reſtitution on the Judgment vacat; and he now prayeth to be reſtored to the ſame Mony, which the Plaintiff by a due Scire facias after Recovered again, which the Court conceived a practice. Adjornatur.

(1)

(5) Bail. NOta per Curiam, when Bayl is put in de bene eſſe (as Bayl taken in a Judges Chamber is) the Plaintiff cannot ſue the Sheriffs Bond till it be refuſed or ſet aſide, but he ought to except againſt it in the Judges Chamber.

Lady Howel aliàs Smyth *againſt* Smyth.

(6) Proceſs. ALthough the Court will give no Relief on an Order made at the Aſſizes, unleſs made an Order of this Court, yet if it be grounded on Agreement, and Verdict had there in purſuance, they will grant a new Trial if the Plaintiff refuſe to ſtand to it, or elſe (as here) will ſtay the Judgment till performance.

(2)

The

The King *against* the Inhabitants of the Forest of Dean.

(7) Common.

After Mony levied by Distringas containing Fieri facias grounded on W. 2. cap. 46. for throwing down Inclosures, and Inquisition taken by the Sheriff, Jones prayed that the Mony might be brought into Court, and remain; and that he might have time to plead, which the Court granted.

In Error, Br. 117. Cole *against* Beston.

(8) Abatement.

In Scire facias against Executors, Q. executionem non; they alledged the Defendant in the first Action died before the day of the Judgment, and that there was a Writ of Error pendant, and that assigned for Error; and the Plaintiff would not proceed by Scire facias ad audiend. Errores after the Assignment, therefore Stroud Sen. moved to stay proceedings in the Scire facias quare executionem non, which the Court granted, notwithstanding Jones for the Plaintiff alledged that the Defendant dyed after the Judgment, and so the Writ of Error was abated. But per Curiam, they will not try such Assignment of Error in Fact by Affidavit, and so the Writ of Error being Supersedeas to sue any Scire facias quare executionem non: The Court stayed it till the Trial of the Error.

Fane *against* Pennoir & alios.

Thursday, May 7.

(9) Admiral.

Powis prayed Prohibition to the Admiralty, the Libel appearing to be of Contract super altum Mare vel saltem in partibus transmarinis infra Jurisdict. Curiæ. 2. The Contract is by Fane for himself only, and after his death the Plaintiff continued the Suit against the Administrators of the Defendant, which is not warranted unless the Administrators were bound: But per Curiam, this is the only cause of Appeal; but for the other cause awarded Prohibition, Nisi.

Baker

Baker *against* Bensford. Ante.

(10) Leases. ISsue being on the value paid by the Administrators that it was less than the Lease was worth which he had made, being supported by Evidence that twenty Acres of Meadow, contained in the Lease, was worth 40 s. whereas those twenty Acres were not contained in the Lease. Allen for the Plaintiff, after Verdict for the Defendant prayed new Trial on Affidavit they were not compriſed, and that Counsel was surprised; which the Court refused; but staid Entry of Judgment till another Cause the Plaintiff had against the same Defendant were tryed.

Burgess Administrator (de bonis non of Gaysell dead Intestate) *against* Clayton.

(11) Executors. IN Debt on Bond, the Plaintiff saith that the Executors (naming them) of G. were dead, (not saying Intestate) for which cause Baldwin moved in Arrest of Judgment; because if any Executor made his Executor, the Plaintiff is not sufficiently entitled. Sed non allocatur. But per Curiam, the Defendant ought to shew there were Executors. Judgment for the Plaintiff.

The King *against* Smeethwicke.

(12) Poor. JOnes moved for alias Certiorari (after Procedendo awarded before) to remove Indictment at Common Law in London for taking an Inmate, which was framed because London is not within the Statute: And by Windham, in this place an Inmate may be a common Nusance. Mr. Recorder opposed it, alledging the Inmate to be a woman of ill fame, and much clamor'd on; and the Old Baily had adjourn'd this matter to a private Sessions in the Guildhall, as is usual, when the business is much of Felons, whom they try first, and there they may sit in Term time. Twisden agreed with Windham, That time and circumstance may make a Nusance; and per Curiam, Procedendo awarded, and the Certioari denied.

Rogers

Rogers and .... *against* Harding.

WInnington prayed a Consultation, the Suggestion for the Prohibition, being that the party was cited out of the County where he lived, which is not within 23 H. 8. the cause of Action being local for Tythes within the Diocess: And 1 Cr. 97. Smyth *against* Poyndrell, this need not be pleaded; but the Court may award Consultation on motion, which the Court agreed; and that the cause cannot come into the Arches, unless per saltum. And by Twisden, if the Prohibition carry a wound in it self, the Defendant may demur, and so the Consultation is the Judgment of the Court. Sed Adjornatur. (13) Tythes.

Philips *against* Whitehead.

IN Action upon the Case on quantum meruit, for nursing Child, in Inferiour Court of Marshalsey: the Count was that the Def. was indebted infra Jurisd. Curiæ pro nutriendo Infantem filium prædict. Def. not said where, the Defendant promised infra, &c. Symson assigned this for Error; and Twisden doubted on this Indebitatus. Windham held it well enough, and that this sheweth that the Debt ariseth within the Jurisdiction, although created by Law. 2. For Nursing is sufficient, without shewing how or wherewith, as indebitatus pro diversis Mercimoniis. Foster agreed; and that there being no other place mentioned, it cannot be intended in any other place. But by Twisden, Infra Jurisdict. Curiæ will never hedge in any thing into Inferiour Court, without expressing it to be done therein; for the particular Grants thereof being de causis emergentibus, i. e. actually; and in all Inferiour Courts, they must set forth their Jurisdiction particularly: But per Curiam, the Presidents are all contrà. Adjornatur. (14) Licu.

Inter Bartlet and Dawson.

D. Being turn'd out of the Corporation of Richmondshire in Yorkshire by the Commissioners, and B. placed in his room, after D. on Mandamus directed to the Commissioners and Corporation, was restored; and now Williams prayed, as to D. a Supersedeas, because the Writ was executed by the Corporation only, without the Commissioners, but some of the Commissioners joyn'd in the Return: Also (15) Mandamus.

the Commissioners power is determined; and so by Allen, no new Mandamus can be granted to them: And if no Return be entred, it cannot now be made by them; yet the Court granted a new Mandamus to the Corporation.

Manby and Richardson *against* Scot in the Exchequer Chamber. Ante.

Saturday, May 9. In Contract. Br. 19.

(16) Baron & Feme. Sinderf. 109. pl. 1. Bart. Distinct. 158.

FOster Ch. J. B. R. for the Defendant, that the Law of Reason, whereby the Wife is to be provided for, is not the Wit or Judgment of any particular, but that Art and Experience which is acquired by long study, as the Lord Coke; and Wives are in the same Obedience to Husbands, as Children to Parents, and for this Cause were on their Marriage freed from their Obedience as Children; they are in equal Authority over the Family, but betwixt them he is superior, as first made, and made for God, she made for him, and so less perfect, Numbers. She (as good Authors warrant) is bound to follow her Husband, although she be never so Rich or Honourable, and he a Vagabond; and if she cannot vow to bind him, much less can she sue him: and a Covenant betwixt Baron & Feme before Marriage, that she shall not be subject to him, is void, and contrary to the Law of God and Nature, and publick Honesty. She wants will, as Infants, and Ideots want Judgment, which is the reason of the cui in vita: So 4 Co. Force *against* Hemling 5 Co. Hemsteads Case, Sir H. Comptons Case, Goldsb. cometh not to this, in regard his seeing her wear Cloaths, bought by her, doth implye his Assent. In Sir Marmaduke Langdales Case, a Prohibition was awarded to the High Commissioners, because Alimony was the proper suit before the Ordinary, and Marriage was her own Act, as well as his; and although to assent, or not, was in her own Election, yet when she doth assent to Marriage, she inclusivè agrées to all the incidents thereof, also at the time of this Action Women were relievable other where, viz. in Chancery, 4 H. 3. 9. Sept. Rot. Clauso, shew the Auncient way of suit for Alimony in the Spiritual Court: As to the Verdict, it was found, that 49 l. for which the Wares were sold, was a reasonable price, whereas the Count is of things of the value of 91 l. Also what the Wares were in particular, is not mentioned as they are in Sir H. Comptons Case: Also its not said of what Trade the Plaintiff is; also necessarium est quod non potest aliter se habere, Ba. Elementa. And in all the Cases cited some particulars are men-

mentioned. Also no Trover will lye, here being a free delivery on a Consideration against the Express Prohibition of the Husband, and so cannot charge him. So 11 H. 4. 31. pl. 57. no remedy for the Cloaths which one Inveigleth anothers Wife, taken away from her Husband withal. And Nil Capit per Billam awarded after on motion of Baldwin in B. R.

Benskin *against* French. Hill. 14 Car. 2.

Monday, May 11.

IN Action upon the Case, the Plaintiff counted on taking of one J. P. by A. on Alias Capias, Dy. 118. and having of her in the House of the Defendant. The Defendant in consideration A. the Bailiff would permit her to remain there until the next morning, promised to deliver her again the next Morning into his Custody, which by Wild for the Defendant, in Arrest of Judgment, is against Law, supposing an Escape to be permitted. Jones for the Plaintiff, the assent of the Plaintiff to this agreement doth make the promise sufficient, although it be an Escape: So whither it be intended that the Bailiff should keep her in custody, or let her Escape, its good enough; especially by Allen, being a promise made to the Bailiff on the behalf of the Plaintiff; and if it had been an insufficient consideration, (which was scand at the Trial) it might have amounted to Non Assumpsit, and therefore after Verdict, this shall not be intended an Escape, but that according to Law, she remained in the House in custody of the Bailiff. Twisden cited the case where Sir John Lenthall suffered one by assent to go out of Prison, and the Plaintiff brought the Action, and held it would not lye; but this Case may be other, no escape being here supposed: And by Windham, by Law the Bailiffs ought not to hurry any immediately away to the Prison, and he may call any other persons in aid, and so may commit the Prisoner to them: and per Curiam for ought appears, here the Bailiff was present all the while and so no escape, in whose House soever the Prisoner be; Hutt. and the promise to deliver her in Custody, is no more then that he would see the party should not escape thence; and if she did escape, it should have been found specially. Judgment for the Plaintiff. Nisi.

(17) Escape. Sidert. 132. pl. 2.

Noys *against* Downing.

(18) Perjury. IN an Information of Perjury, Glyn moved for to stay Judgment, or have new Tryal after two Verdicts, on Affidavit of one of the Witnesses for the Plaintiff, that he was tampered withal by the Plaintiff, (who was convicted of Felony) and proffer'd the Money into Court: But by Wild for the Plaintiff, there is no Indictment found against the Plaintiff, and therefore no reason to stay; although, as Portingtons Case on Conviction of Perjury, there be no remedy after Execution done; nor, by Twisden, was it ever done, except in one Trial betwixt Lucas and ..... by the procurement of Braughton, then Secondary. Judgment for the Plaintiff.

Archer Bailiff of Lancaster, Grile *against* Disny.

(19) Execution. THe Court awarded Tipstaff against him, on Suggestion that Execution was done on several Actions split for one debt in Inferior Court after Prohibition, notwithstanding each sum was for several parcels, distinctly, delivered at several times, on several contracts created by Law: But, per Curiam, had the contract been intire, as to deliver several parcels, one is delivered at one, another at another time: Also an Attachment in Court Baron is but as a Capias in Manus, they may be seised into the Lords protection, but must be left with the party, and cannot presently be condemned as forfeited. Also where the Contracts are several yet when stated by account, the whole debt is Intire, as here the parties had done. Also by Windham, an Attachment may be awarded the first dash, without Prohibition to Inferior Court on Affidavit of such splitting, where the Count awarded the Bailiff to custody, till security put in to answer Interrogatories.

Harvie

Harvie *against* Martyn.

OF a Master of a Ship; The Defendant, without other Colloquium of his Profession, said of the Plaintiff, Thou art a cheating Knave, and a cheating Rogue, and thou hast cheated my Son in Law B. of a Cable Rope, belonging to the Bark. It was further said, that he got his living by carrying outward and homeward. Jones conceived the words not Actionable, without shewing the Plaintiff was Master of the same Bark to which the Rope belonged: So to say of Reader, that he cheated the Defendant of Reads, which might be out of his profession. Twisden held the words ought to be applied to his Profession; for the Plaintiff might cheat him at Cards of the Cable. Windham conceived the words Actionable. Adjornatur in Arrest of Judgment. (20) Slander.

NOta, On motion of Mr. Day for new Tryal, for want of Witnesses material to prove the Custom of the Mannor of Beeling to cut Trees, the Court refused it, being of things lying in publick notice of the Country: But if it were a Tryal on a Deed, or such particular wherein any material Witnesses is wanting, they will grant a new Tryal, per Curiam. (21)

Glanvell *against* Gullison. Siderf. 132. pl. 5.

THe Plaintiff counted he was a Faithful Subject, and the Defendant said he was a Rebel against the King, which, by Siderf. in Arrest of Judgment, is not Actionable, in regard he may be so by standing a Commission of Rebellion in Chancery, as 3 Cr. 621. Wells *against* Hemersham, which Windham agreed; and that there is no difference betwixt Rebels generally said, and Rebel against the King: Yet, by Twisden, Action quod Crimen Rebellionis imposuit lyeth, but here the Court thought it did not. Sed Adjornatur. (22) Slander. 1 Roll. 69.

Butcher *against* Erlefield.

NOta, per Curiam, after Issue, the Plaintiff cannot discontinue, without assent of the Defendant. (23) Nonsuit.

Garth

Siderf. 133. pl. 6. Garth *againſt* Mois.

Tueſday, May 12.

(24) Aſſurances. IN Evidence to a Jury, it was held by the Court, That a voluntary Conveyance executed is not fraudulent, becauſe voluntary; but it's great Evidence of fraud againſt an after-Conveyance made bona fide, becauſe the Statute avoids ſuch Deeds as are bona fide, and on conſideration, if made ea intentione, to defraud Purchaſors: And therefore this fraud muſt be found by the Jury.

Williams *againſt* Hulet.

Wedneſday, May 13.

(25) Deeds. 6 Co. 45. Higgins Caſe. 26 Ed. 3. 17. ſeu 71. Debt, Fitz. 181. Siderf. 131. pl. 1. NOta per Curiam, when the Plaintiff counted on Bond, it ought to remain in Court, unleſs the Defendant (as here) after Oyer demanded, ſuffer it to be delivered out, then on Non eſt factum, the Court will not order it to remain there on prayer of the Defendant, although anciently it hath been ſo: Wherefore, per Curiam, the Bond was re-delivered to the party, out of the hands of Barwell, Clerk of the Rules.

In Demiſe, Br. 10. Prodger *againſt* Langham.

(26) Aſſurances. Siderf. 133. pl. 7. IN Evidence to a Jury, Leaſe was made by Bond in truſt to the uſe of his daughter, if Marriage be had with A. if not to raiſe 2000 l. for her if ſhe married with conſent of J. S. if J. S. were living at the time of the Marriage, per Curiam, ſo 46 Ed. 3. 5. b. pl. 15. J. S. hath time during his life to conſent, and they held a Living of J. S. with the Feme and her Husband, the Plaintiff, after in friendly manner, although he diſſented at firſt, is good Evidence of an Aſſent. 2. They allowed proof, that the Plaintiff ſaid to the Defendant, He had a Title (when he durſt not ſhew it, being a Malignant;) And the Defendant in thoſe times ſaid, If he ſhewed any he would lay him by the heels, but not as binding. 3. The Leaſe was in truſt for 2000 l. when ſhe married with aſſent and approbation, and in the mean time for her Maintenance, and ſo thoſe were Truſtees for her preſently, and ſhe being no party to the Conveyance to the Defendant, ſhe was relieved againſt Non-claim on Fine within the Act 14 Car. 2. cap. 25. of Judi-

contra { 1 Ven. 199. 2 Lev. 21. 1 Mod. 86. 300. Can. Cas. 130.

cial

cial Procedings. 4. This Lease for Maintenance of his daughter, is a voluntary Conveyance; but if it were for raising a Portion for such person as she shall marry, after marriage this is a Conveyance for valuable consideration, by Windham & Curiam: Also a fraudulent Conveyance may become a good one; as if the Feoffée doth convey it over for value before the Feoffor conveyeth it, the Feoffée of the Feoffée shall hold it against Feoffée of the Feoffor: So Action upon the Case lyeth on promise to give 100 l. cuicunque maritaret filiam. And the Case, P. 3 Jac. Ribbon *against* ..... was reversed, for not saying quod fidem adhibens promissioni maritavit, &c. 5 Coke. 60. Gooches

Siderf. 134. pl. 8. The King *against* Paget.

Thursday, May 14.

PEr Curiam on Information against an Officer (although 7 H. 6. 38. Appearances generally in Criminal causes be entred by Attorney) no Process as in ordinary cases by Distringas shall issue; and such Process being awarded, it was improvidè, and against such the course is, That the Information be read to him as præsente, and in his default Judgment shall be against him as on default; and not by Nihil dicit, as against Prisoner in Custodia. (27) Attorney.

Bonithon *against* Kendall.

SHe was the woman that had a base Child, and that it was at L. and a Red-headed Boy, after Verdict without special Damage, not actionable per Curiam, without alledging it was likely to be a charge to the Parish. (28) Slander.

The King *against* Gouer.

NOta per Curiam, that an Informer (on conviction of the Prisoner of Extortion, or other Penal Law) may have the third part of the Fine the Court set on him, according to the Kings Privy Seal to that purpose; and here had so of 10 l. set on a Bayliff for 3 l. taken for Execution done to the person of J. S.

Felgate

Felgate *against* Mole. Ante.

(30) Execution. THe Plaintiff having recovered against the Defendant, took out Execution against Turner the Bail, which by Rule of Court, Pasch. 1656. was vacated, but no Restitution awarded; but the Bail brought Trespass, which was a hard Judgment per Curiam, and after such Recovery now prayed Restitution, without acquainting the Court with the other Recovery, and hereon had taken the Plaintiff now in Execution, who now prayeth a Supersedeas, which the Court granted, and conceived no Entry that the party be restored, ought to be (on vacat award) without privity of the Court.

Flower *against* Mahew. Ante.

(31) Trover. IN Trover pro una magna Salsura, Anglicè a Salting-trough, which being after a Verdict, is but false Latin, and aided, being in declaration, by Guider for the Plaintiff, who moved for Judgment according to Osborns Case. Twisden conceived this Anglicè is idle, the other Latin word having a proper signification, as pro uno Equo, Anglice an Ore: And this is the rather naught, because Damages are particularly given for this Salsura, which the Court agreed, and awarded Nil Capiat per Billam.

Euster *against* Grove.

Friday, May 15.

(32) Amendment. 2 Cr. 232. pl. 5. SYmson prayed an Amendment after Verdict, and Judgment in Trover, the Judgment being quod Recuperet part, and that the Defendant, as to the part whereof he was found Not Guilty, should be acquitted, but no eat inde sine die entred, which being in another Term, the Court inclined it were not amendable. Sed Adjornatur.

Parre

Parre *againſt* Evans. Ante.

(33) Admiral.

After Sentence twelve years, on Appeal, the Plaintiff prayed a Prohibition, being Bail to the Defendant in the Admiralty Court, the Defendant being dead, and ſo if it be granted the Defendant in the Prohibition is without remedy, and the Libel is never expreſs, that the Contract was out of the Juriſdiction, but that it was ſuper altum Mare vel ſaltem in partibus tranſmarinis. 2. Wild for the Plaintiff alledged, That this Bayl was only to abide the Award of that Court, which was diſcharged by the death of the Defendant, and ſo the Proceedings of that Court againſt the Bayl on his Recognizance, without any new Proceſs, is void, although this Recognizance be not under Hand and Seal, but by way of Acknowledgment, as Fide-juſſor, which per Curiam, they have no power to take by our Law, although by their Law they may levy thereon the Condemnation in the principal Suit, not the Penalty of the Recognizance, but if they ſhould, the only Remedy againſt it is by Appeal, not by Prohibition, wherefore the Court denied it. Poſt. 500. pl. 56.

Fermer *againſt* Bennit.

(34) Prohibition. 2 Bulſtr. 150. Chattels, Br. 11.

Baldwin prayed Prohibition to the Eccleſiaſtical Court of Peterborough, in Libel for a Pue in Navi Eccleſiæ, ſuggeſting cuſtom to Repair, which the Court granted.

The King *againſt* Haughton.

(35) Baron & Feme.

Powis moved to quaſh an Order of Seſſions of Bucks, made for Alimony to his Son's wife, the Son being alive, and ſo bound to maintain her; which Order was made by conſent of the parties for the womans Relief on 43 El. 2. but it doth not appear ſhe was poor, or likely to be chargeable to the Pariſh, as it ought, per Curiam: But the payment to be made monthly is well enough; but for the other cauſe, it was quaſht per Curiam.

The King *against* Archer. Ante.

(36) Imprisonment. CRofts prayed to charge the Defendant as in Custodia, being committed for a Contempt, which the Court granted.

Bick *against* Edwards.

(37) Common. ACtion upon the Case by Commoner for restraining his Common, which he claims by custom to Tenement for all Cattle levant and couchant, not saying the Cattle were levant and couchant on the Tenement, to which he claimed it as appendant. After Verdict, Williams moved this Exception in Arrest of Judgment; But the Court thought it well enough, as Stone and Mussendens Case, where it was held on demurrer to be naught, but after Verdict it's well enough: But by Williams this Case differs, in that the Plaintiff hath prescribed only for Beasts levant and couchant, and therefore ought to averr the Beasts he put into the Common, that were restrained, were such. Sed Adjornatur.

Smyth *against* Conyers. Ante.

(38) Covenant. ERror of Judgment in Action of Covenant to enjoy Lease for Remainder of Term to come, in consideration whereof the Defendant covenants to pay an Annual Rent at several Feasts, during the said Lease, and the Breach is assigned in Non-payment of the Annual Rent ad separalia Festa, during the residue of the said Term; which, by Allen for the Defendant, is incertain, and no sufficient ground for the Jury on this Writ of Enquiry to give damage, not shewing how many Rent days incurred, nor for what time certain the Lease was. Jones for the Plaintiff, The certainty of days past is not necessary, especially in the negative Covenant, in which its sufficient to pursue the general words, and the rest may be given in Evidence: And this Breach goeth to all the time past, and may be pleaded so in bar of any future Action, which the Court agreed: And be the Term in being, or at an end, yet the Defendant appears to have broken it sufficiently, and the damage may be given in Evidence for how many days Arrear; and here it will be intended the Defendant paid it at no day. Judgment affirmed, Nisi.

Van-

Vanganghell *againſt* Brownwicke.

IN Account againſt a Bayliff for a Necklace of Pearl. The Defendant pleads Ne unque Bayliff, and before Auditors pleads in diſcharge, that he delivered them over by appointment to a Goldſmith on agreement to ſell, or deliver. To which the Plaintiff pleaded Non deliberavit. To which the Defendant demurred; which had been well, if the delivery over had not been alledged to be by agreement; but for that cauſe the demurrer was held frivolous: Alſo by agreement that Bayliff might ſell them, or deliver them to the Goldſmith, and he ſaith he delivered them over by appointment; the Plaintiff traverſeth that he did not deliver by appointment: To which the Defendant demurred, and per Curiam well, becauſe the appointment is not traverſable, the Bayliff having original power to agree. But the Court ordered an Amendment by conſent. (39) Account.

Fitz-William *againſt* Lewis. Ante.

IN Audita Querela, The Plaintiff counted that Sir H. B. to whom he was indebted, became a Bankrupt, and that certain Creditors had his debt aſſigned to them, and that one of them accepted part of his debt in ſatisfaction of the whole; for which cauſe, not ſhewing what was the debts of the Creditors, that ſo his payment might appear proportionable to the debts, the Defendant demurred: Sed per Curiam, it's well enough, eſpecially being an Action by one that is a debtor; and the very Aſſignment is a ſufficient bar againſt the parties; and if there were Surpluſage, the Defendant hath remedy in Chancery. Judgment for the Plaintiff. (40) Bankrupt.

The King *againſt* . . . .

MArſhall prayed Certiorari to Remove Indictment at Seſſions at Hartford of the Defendant, quod non reverenter & modeſte ſe geſſit during Divine Service, which although puniſhable by Eccleſiaſtick Cenſures, yet the Court conceived it a proper cauſe within Cognizance of the Juſtices of Peace, and refuſed to grant it. (41) Church.

(42) Tythes. March. 21. pl. 49.

IN Action of Debt for Tythe, the Plaintiff counted that the Defendant was Occupier of 20 Acres, & quod variis granis ſeminavit prædict. 30 and that Tythe were payable of the ſaid 30 Acres: And alſo that in another year, the Defendant ſowed prædict. 30 Acres iterum, which, by Conyers, in Arreſt of Judgment, its ill, the years being ſeveral, and the Allegations ſo; which Foſter agreed, Sed curia contrà: And that 30 is but Surpluſage & prædict. is ſufficient; and the Count that the Defendant was occupier, need not be iterated in every ſeveral year for the ſame thing; but the Count being quod ad huc poſſidet, it goeth to the whole.

Judgment for the Plaintiff, Niſi.

Wiſeman *againſt* Cotton. Ante. Siderf. 135. pl. 10.

Saturday, May 16.

(43) Dyers Reading 15. pl 24. See 12 Car. 2 Cap. 3. the Statute of Wards and Liveries doth particularly enable ſuch to deviſe, elſe they could not.

ALlen for the Plaintiff, that the Act of 2 Ed. 6. that takes away the Cuſtom of Gavelkind, takes away not only diſcents, but the right of deviſing, notwithſtanding this hath been alledged to be a Collateral Quality, by the expreſs words of the Act, which takes away the Cuſtom of Gavelkind, and that the Lands ſhall in no ways hereafter be departible. 2. That they ſhall from hence forth, to all Intents, Conſtructions, and purpoſes, be as Lands at Common Law, which cannot be ſatisfied by taking away diſcents only, without taking away all other Incidents. 3. The Act goeth yet further, As if the Lands had never been of the nature Gavelkind, in which caſe they could not be ſo deviſed. 4. Any uſage or cuſtom to the contrary notwithſtanding, which takes away all incident cuſtoms. 2. By the intent of the Act, which cannot be reſtrained only to the firſt part of the Act of Lands diſcendable, for then all the words of the Act will not be operative, which is neceſſary in the beſt Conſtruction of Acts of Parliament. 2. Generally clauſes are not to be referred to what is particularly provided for before, as this of diſcents is. 3. It could not be the intent of the Act, that all the Cuſtoms of Kent collateral ſhould remain, and only that of diſcent be taken away; Vide the Enumeration of them, Lamb. Perambulat. 541. 4. Here is no Lands particularly mentioned, but only all the Lands of ſuch perſons; ſo that if theſe Collateral cuſtoms ſhould remain, in 100 years hence none can tell that theſe Lands were the Lands of ſuch perſons, and ſo it will return again to Gavelkind, theſe Collateral cuſtoms ſeldom

seldom hapning; and therefore should be taken away with the principal custom of discent. 3. The custom of devising, is of the same nature (as the other collateral Customs) only annexed to Gavelkiend, as found by the Jury; but yet all are incident to the custom of Gavelkind, and derative out of it, and dye with it, Vide librum de consuet' Cantiæ, 2 Inst. 13 Ed. 1. called the Statute de consuet' Cantiæ, which begins, These, &c. are the customs which the Gavelkind Men in Kent Claim, P. 4. Ed. 1. C. B. Rot. 2. There is a Record, Margery Uxor Godfry petit versus Dagnam medietatem of such Lands; the Defendant pleaded that the Land is Gavelkind, and that the custom is, that on Fornication Widow should lose her Dower. The Plaintiff replies, she was never Convicted according to the custom of Gavelkind by Hue and Cry, when she is parturiendo. The Defendant denied the custom alledged by her, and the Jury find that she committed Fornication, and was convicted, and that it was not necessary (as she alledged) that she should be taken by Hue and Cry when she is parturinendo, wherefore Judgment was against her for the Tenant; whereby it appears, that had not these Lands been alledged to be Gavelkind, this custom could not be pleaded, and that being taken away, both respectu tenuræ & naturæ, the rest fall. 4. There needs no special prescription, 19 Ed. 3. Ayd. 144. (as is alledged) to any of these particular customs, 16 Ed. 3. Ayd. 129. Rast. Entr. Dower in demand. §. 6. as where the Lands are not Gavelkind, there is as process, Rast. §. 1. 2. & Dower Rast. §. 7. Its agreed that the Gavelkind in Ireland and Wales is different from those of Kent, and of different introductions, and so that they have not these collateral customs, is no argument against these of Kent. And 2 Ed. 4. 19. 5 Ed. 4. 8. shews, that all these customs are alike, and to be pleaded alike, but not by a tempore quo non extat memoria, but only that the custom of Kent is this or thus. Lands auncently of the Tenure of Knights service in Kent, are not Gavelkind, yet the inferior Tenants of such may hold by this custom; and should their Lands come to the Lord by cessavit, disclaymer, Escheat, &c. it ceaseth to be of the nature of Gavelkind, being of the same nature with the Demeans, although Lamb. Peramb. 545. its a Quære, and none of these collateral customs do after remain; so when Gavelkind comes to the Crown, they cease to be so, and the Queen shall not be endowed of the Moiety, although Feme of Patentée shall; for by regranting by the King, they remain as in their Original. 5. The Jury find the Lands in Gavelkiend in the King generally devisable by custom, which cannot be now pleaded by the custom of Kent

12 Ed. 4. 9 b. pl. 22. by *Littleton.*

only

only they cannot, for that would extend to Knights service also; nor by the custom of Gavelkind in Kent, because that is taken away, M. 21 Car. Uxor Car. Brook demand the third part of this Manor, as at Common Law, M. 16. Jac. Rot. 2353. Bullrod and Mary, Uxor Car. Brooke demand the Moiety of Lands, to which the Tenant pleaded, the Lands were not Gavelkind, and Issue thereon found pro tenente, that the Lands were not so, whereon she lost her Dower; thus by reasonable construction and all the forms of pleading, this custom is only dependant on that of discents, and so taken away with it.

(2) Wild, Kings Serjeant Recorder of London, for the Defendant, The mischief intended to be prevented by the Act was, the decaying of Great Families, 1 Inst. 140. by this custom, and is of the same nature with 31 H. 8. 8. 34 H. 8. 16. & Lamb. in his Peramb. in his exposition of the word Gavelkind, looketh only at the partibility and descent among Males, 14 H. 4. 18. 11 Ed. 4 6. which ariseth out of the nature of the Land, but the other customs are collateral, and only annexed to the Lands in Kent 1 Cr. 561. and 1 Inst. 166. And in other Countries, as Philpot villare Anglic. in Holland, Saxony, &c. are distinct without these customs to devise, &c. And should these become by this Act, as Lands at Common Law, all the devises since that time would be void, because the Statute of Wills was before this Act, and so reacht not them: Also the intent of the procurers of this Act, could not be so much to lose all their customs of Tryal, Alienation without licence, keeping after Felony committed by Auncester, &c. but only to keep their Estates intire in one Body: Also common right being within the custom of Kent, the adverse party that would set up an Act to destroy them, must shew presidents of Dower brought of the third part, as at common Law, of Lands in Soccage there. Windham conceived there are divers customs in Kent, although the most notorious be Gavelkind, viz the partibility; and all the customs of Kent are of equal distinct authority, as Laws of another County confirmed to them, being saved to them by the Conqueror, And the doubt is only, whither the Act intended to alter only the custom of Discents, or all other customs of Kent. Also Kent doth not prescribe in any of these customs, but only that the custom is thus; but for discents, one need not alledge that it is the custom, but that the Lands in demand are Gavelkind; whence the Court will take notice that they are partible; and although the pleading be, that such Lands are of the custom of Gavelkind, and partible, yet its not necessary to

shew

shew they are partible. Foster directed the parties to get a new Explanation by Parliament for the difficulty and consequence of it. Adjornatur.

Gwin *against* Gwin. Siderf. 138. pl. 11.

(44) Wales. Williams except to the removal of a Writ of Right. 1. The Writ of Error being to remove a Plaint in quod ei deforceat, which is not sufficient without saying that Protestation was therein entred in the Great Sessions in Wales, to prosecute in nature of Writ of Right at Common Law, 1 Cr. 310. Gwin *against* Gwin 1 Cr. 178. according to the Record though the Book be not so. 1 Cr. 262. Cuffin *against* Vaugham. And thus are all the presidents 1 Cr. 444. Windham conceive it not necessary, but may be both ways. 2. The Error was of a plaint in that Sessions by Writ, which is a contradiction, which the Court agreed; had the Plaintiff rested there; but when it goeth farther of Plaint of quod ei deforciat its well enough. 3. The Writ of Error specifieth not the time and place of the Plaint in the Inferior Court which per Curiam is not necessary. 4. Its directed to the Justices of our Great Sessions, and the Return is only by one Justice, which was mistaken, and the Writ directed to the Justice. The Error assigned by Baldwin for the Plaintiff in the Writ of Error. 1. In the Judgment, which was, that he should hold the Land to him and his Heirs, and that the Plaintiff hath magis jus habendi quam tenens tenendi tenementa, by which it appears the Plaintiff was out of possession, and then the Judgment ought to be quod Recuperet sesinam, Rast. Entr. 368. 246. Co. Entr. 182. so in a Formedon 1 Cr. 310 Gwin *against* Gwin, where the Judgment is for the Tenant, as Penrins Case, its always quod teneat. Windham conceived this to be Error, which the Court agreed.
Adjornatur.

Newman *against* the Inhabitants of Stafford.

(45) Fresh Suit. Siderf. 139. pl. 12. March. 10. pl. 28. In Action on the Statute of Hue and Cry, by Special Verdict it was found, that the Oath was made duly, and an Action brought by Original within 20 days according to the Statute of 27 Eliz. 13. and that being discontinued by charge of Government, the Plaintiff brought another after the 20 days, and within the year without any continuance or new Oath made, which per Curiam is void, and so by Wild hath it been Ruled, last Hartford Assizes by Bridgman C. Justice of

of the C. B. But per Curiam, the party might make a new Oath. Adjornatur.

Gavell *against* Tasker. Ante.

(46) London. March. 15. pl. 34. JOnes relied on the Exception, That this By-law was contrary to Law, as restraining any private persons to work with their own Carts, with their own Goods. Sed non allocatur, for it must be intended of common working Carts. 2. It's said they took the Carts by virtue of the By-law, which must be intended working, wherefore they encline for the Defendant. Adjornatur.

Debt, Br. 49. Glascocke *against* Morgan. Ante.

(47) Execution. BAldwin for the Plaintiff, held the Plea in barr ill, and that Debt may be brought on the same Judgment, notwithstanding Elegit sued forth, and only Goods taken thereon short of the value of the Debt. 1. Because it's the proper and chief Office of an Elegit to extend Lands and Goods; and a Term may be as well extended by Fieri facias, and the Election is of the Lands, not of the Writ upon W. 2. cap. 18. and therefore 15 H. 7. 15. 30 Ed. 3. 24. 21 H. 7. 19. L. 5 Ed. 4. 21. have been denied to be Law, Hub. 57. and the difference is where only Goods are taken, and where Lands for every Elegit includes a Fieri facias, 17 Ed. 4. 4. is express, that one may resort to new Execution, when nothing is done on the Elegit. And 2. though such an Elegit entred on the Roll, might have been pleaded in barr of a new prayer of Execution on the Roll, yet it's not pleadable here in barr, being as 2 Cr. 338. Cowly *against* Lydgate, Godbolt 257. but a partial satisfaction only, and this was the reason of the Statute of 21 Jac. which giveth new Execution on eviction or determination on the same reason, 21 Jac. 24. for real satisfaction of Debts, in Dyer 298. pl. there were Lands extended. Wild for the Defendant agreed, That when Lands are taken it is a Bar, and so when only Goods are taken; for this Election is not of the Lands, but of the manner of Execution de Breve de Fieri facias, or quod Vicecomes liberet de terris, &c. Also if this might have been done (as L. Co. 81. on the Statute of Merton) it would have been done before now: But Process, F. 52. is express, that after Entry of Elegit no other Execution can be taken: Also this Statute giveth a different manner of Execution from the Common Law, for herein the Beasts of Plow are excepted. Windham much favoured the Lord Hub. 58. his Opinion.

3 Cr. 310. pl. 19.

Opinion, 30 Ed. 3. 24. Strath. Execution 14. but against that body of Judgments against it, could not imbrace it, but held no Action of Debt lyeth, those ancient Judgments having been pursued and remembred in all times downward. And L. 5 Ed. 4. 41. is a great Authority express; and Coke 2 Inst. 395. cites all these Books, and concurs with them, and so hath been the uniform Opinion: And the Writ prayed 17 Ed. 4. 4. was never entred on Record, being never Return'd, and so new Execution might be taken by Scire facias, which yet being within the year was needless, for on continuance the Scire facias might have been taken out presently. Twisden held the Action lay, and that the best Exposition of the Statute is to advance Justice and Right, and to help men to their debts, and not for a trap to catch men: Also the Statute mentions no Elegit, as a distinct Writ of Execution, but sit in Electione, whether he will have Land and Goods, or only the Goods & quoad the Goods; this Statute is but in nature of a Fieri facias, and therefore this Statute is said to be the first that subjects the Lands, and on this reason a Capias is suable after Fieri facias, if no satisfaction be had: Also the Statute did imitate the common Law, (as the Statute Merchant excepted Lands descending to Infants) and therefore excepted the Beasts of the Plow, as they were at common Law. Foster remembred the Transactions of Foster and Jacksons Case, and inclined the Action lay, debts being to be satisfied before deadly sin, as was there said, and Execution is the Life of the Law, of which the Judges ought to be very tender.

Adjornatur.

The Corporation of Southampton *against* Richards. Ante.

Siderf. 142. pl. 17. Monday, May 18.

ALlen for the Plaintiff prayed Nil Capiat per Billam, the Action being in the debet, upon Bond of Felo de se, whereof as bona they have Patent, whereas it should be only in the Detinet, which the Court granted, and that it be specially entred. (48) Coron.

Clerke *against* Newman.

Hil. 14 & 15 Car. 2. Rot. 661.

(49) Trover. Siderf. 139. pl. 19.

TRover de trecentis (not saying ponderibus, or any Anglicè) & duobus quarteriis unius Centenæ prunorum, Anglicè Pruans, which, by Jones, in Arrest of Judgment, is void, and not only insensible, as the Case de duodenis fili, but like the Case of trecentis ponderibus lupulorum, which was void, for the incertainty of what kind of weight; but if it had been trecentis pondis, it had been well enough. Windham conceived the Case at Bar like the Case of Pargiter *against* Cressey of duodenis fili, which the Court agreed. 2. Of 96 yard of panni-lanei, Anglice, Dowlas, & alij panni-lanei, like the Case of Staunton *against* Lufton, Repl. de centum Ovibus, Agnis & Matricibus, which was held ill. Windham conceived it well enough: Sed Curia dubitavit. Adjornatur.

The King *against* the Inhabitants of Yarnton. Ante.

(50) Ways. Siderf. 140. pl. 14.

IN Information for not repairing a Way, and Verdict for the Defendants. Williams moved for Repleader, the Issue being, that they ought not to repair, which (the Lands being laid in their own Parish) is contrary to Law. The Court held the Issue ill; but a Tryal having been thereon, its well enough, as in the Case of Camberwell 22 Car. 1. in B. R. remembred by Twisden. 2. The Verdict finds the Defendant ought not to repair, but do not find who ought, which the Court doubted, but if it had been found that the Defendant ought to repair, it had been well. Adjornatur.

The King *against* Hubbard, &c.

(51) Peace.

INdictment of a Riot, quod Juratores onerati & Jurati, dicunt pro Domino Rege (not saynig) super Sacramentum, which per Curiam is ill, præter Windham, who held it well enough. Twisden remembred a case hung long, and at last quasht, being quod onerati & Jurati super sacram dicunt, without any dash.

Dor-

Dorrington *against* Sliper.

IN Action upon the Case upon Indebitatus in the Palace Court for Oats sold, not saying where, which by Stroud was assigned for Error, after Judgment for the Plaintiff, Sed non allocatur. 2. Both parties were not of the Houshold, which per Curiam is needless, when they try by vertue of their new Patent; contrà where only as a Palace Court. As to the first exception, Foster and Twisden conceived they ought to shew where the sale was; Windham contrà, and that the Defendant could not be said to be indebted within the Jurisdiction, unless the sale were there. (52) Lieu.

Hen *against* Hanson. Siderf. 141. pl. 16.

Hill. 14 & 15 Car. 2. Rot. 822.

IN Action of Covenant for Rent Arrear on Lease for years. The Defendant pleaded general Release, of all demands (which was made by Award on Collateral differences betwixt them) made after the Covenant, and before the Rent due in Bar: To which the Plaintiff demurred; and Poultnee for the Plaintiff, assigned the reason to be because the cause of the Release was particular and collateral, 2 Cr. Clun *against* Fisher: Enion *against* Bridges, Yelverton 117. Jones for the Defendant, that it is a good Bar, whatever the intent of the Release were, Lit. 118. Sect. 510, & 513, this being a word of the largest extent; by such words one may discharge Common, or Rentcharge, which is a present duty: Nor is there any difference betwixt Rent of Inheritance, and Rent reserved on Lease for years; for this is an interest assignable. And 2 Cr. 486. Wotton *against* Bye, is expressly so adjudged, in case of Release by assignor of Term, reserving Rent; which differeth not from the reason of this case in Moor 544. pl. 723. Harding *against* Collings, 3 Cr. 606. One made a Lease for years, rendant Rent. Lessee assigns over his Term, and after Lessor Release to Lessee all demands, which doth not discharge the Growing Rent, because now the properest remedy for the rent is against the Assignee; and hereby is implyed, that had the Release been to the Assignee, it had discharged the Rent. Foster conceived that this is a good Bar in Debt, but not in Covenant, 2 Cr. 107. 5 Jac. Hancock *against* Field. Also per Curiam, no Tenure nor Inheritance is hereby granted, but Fealty, Waste, and other Incidents still remain: (53) Rent. 3 Cr. 606.

main: Also by Allen for the Plaintiff, when Annuity is Arrear, and such general Release of all demands is given, it doth not Bar the growing duties: The Court doubted. Adjornatur.

Peacock *against* Burrel. Ante.

(54) Lien. INdebitatus within Jurisdiction of Marshalsey for Wares sold, not shewing where, which was assigned for Error; but by Wild for the Defendant, if no other place be mentioned, it cannot be otherways intended, but to be within the Jurisdiction; contrà where any other place is mentioned, as in consideration H. would go from Newcastle to Nants in France. Windham agreed the Action well laid, Foster & Twisden contrà; the Law makes the Debt only on the Sale, and the Jury must enquire of the Sale, which, in regard no place is alledged, may be in any foreign Country, and nothing shall be presumed in Inferior Courts, but must be expressed. Wild conceived the place of the sale not traversable, and therefore ad tunc & ibidem is not material, but yet if the Sale were not within the Jurisdiction, the Plaintiff would be perjured in swearing his Plea. Adjornatur.

Tremain *against* Sands.

(55) Ejectment. NOta per Curiam in Evidence to a Jury, that an Ejectment will not lye of a Free-Warren, therefore quoad that the Defendant was directed to be found not-guilty.

Evans *against* Parre. Ante 489. pl. 33.

(56) Admiral. POwis prayed Prohibition to the Admiralty, suggesting de novo quoad the Bail only, who was not medled with till of late, and of their Recognizance the Admiralty hath no Jurisdiction, 4 Inst 134. being no Court of Record, and so its not proper to appeal but to have a Prohibition: But by Windham, this is intended of Recognizance that binds Lands, but without stipulation in nature of fide-jussor, they cannot maintain any Jurisdiction at all, which the Court agreed, as in the Spiritual Court, and all Courts, is usual: Twisden absente. Adjornatur.

Davenport

Davenport *againſt* Stareſmoore.

D. Executrix of D. in conſideration that the Teſtator would give further day unto 10 November next following, to be paid unto ſuch a perſon, and in ſuch a place as the Teſtator of the Plaintiff ſhould appoint in London promiſed that then he would pay to him, not ſaying where. The Plaintiff averr'd that although his Teſtator had forborn, yet the Defendant had not paid, &c. The Defendant pleaded that he paid it to ſuch perſons as the Teſtator did appoint, &c. which by Allen for the Plaintiff, after Verdict, is well enough, the forbearance being the Conſideration, and the appointment in L. is ſuperfluous and needed not be averr'd in Action upon the Caſe; but only that the Defendant had not paid to the Teſtator in his Life-time, nor to her after his Death: Windham conceived he ought to aver the appointment; contrà by Foſter, if Iſſue were only non Aſſumpſit, but being on Non ſolvit ad diem on performance pleaded by the Defendant, its doubtful. (57) Executors.

Adjornatur.

The King *againſt* Leverington.

Jones excepted to an Indictment for exerciſing the Trade of Goldſmith, not having ſerved according to the Statute, it being in the Body, quod Juratores pro Domino Rege ad inquirendum ad largum pro corpore Comitatus, which per Curiam, is well enough. But 2. Not concluding contrà pacem, but only contrà formam Statuti, it was quaſht. (58) Trade. March. 124. pl. 204.

Rogers *againſt* Weſcot. Ante.

Winnington prayed a Conſultation, becauſe it appears by the Prohibition it ſelf, that it was void by motion without pleading, 1 Cr. 69. Smyth *againſt* Poyndrel, and it was granted per Curiam. (59) Prohibition.

Morgan

Morgan *against* Sloper, &c. Manucaptors of Goodwin.

(60) Bayl. NOta per Curiam, after the Declaration once accepted, the Bayl cannot be excepted against for insufficiency, which the Clerks agreed, unless some practise be used, as here, by one Dr. Cruso, whom the Plaintiff thought able, but was not.

Williams, &c. *against* Hall, &c.

Wednesday, May 20.

(61) Ejectment. ON Trial at Bar, the Defendants refused to confess Lease, entry & ouster, Per quod the Plaintiff was Nonsuited; for which cause Wild, the Kings Serjeant moved, That in regard the Plaintiff was to pay costs, and that the default was the Defendants, that the Plaintiff might have an Attachment against the Defendant, according to the course of the C. B. which the Court granted, as the usual course here. Post.

Fryer *against* Combe.

(62) Entry. IN Evidence to a Jury, it was offered as Evidence of an Entry, a Note thereof, subscribed by the person that Entred, and the Witnesses thereto, who were dead, and their hands only proved, and that it was done by direction of Hyde, Justice of the C. B. who testified it, which after some doubt the Court would not admit, without proving actual entry, especially being to avoid a Fine; but they admitted what Hyde said, as a good Enducement to the Jury, but no convincing Evidence.

Brown *against* Spence in Ejectment.

(63) Incumbent. IN Evidence to a Jury, it was held per Curiam, That Reading the Articles in the Church Porch is sufficient (the Divine Service being there) by reason of denial of the Key of the Church by the Defendant. 2. Lessee at will of Disseisee by attorning, as Locker *against* Polvert, to Disseisor, doth determine the will, and his continuance in possession after, doth make him Trespasser by Windham, Sed Curia contrà; but all agreed that a special Action upon the Case will lye against him for keeping possession, per quod the Plaintiff lost the

the profits, &c. and if such person be any ways concerned in the Controversie, it's a disablement to be a witness, so much as to prove Induction and Reading the Articles. Quære if reading the Articles at a reputative Hamlet Church, that is belonging to the principal, be sufficient within the Statute, the principal Church being shut against him. 3. The Plaintiff produces an Institution of the Bishop, which recited only that there was a Judgment and a Writ to him, which per Curiam, is not sufficient, without producing a Copy of the Judgment, or Award of Execution, no more then the Case of Pinder *against* Wright on diem clausit extremum, the Writ being lost, although there was an Enquisition, and such like Papers, it was held insufficient on demurrer, as Twisden cited; yet if Fieri facias (which the Sheriff is no more bound to Return than this Writ to the Bishop) be lost, the Court will, and frequently doth admit the Warrant of the Sheriff as Evidence to prove such Writ. 4. It was held, per Curiam, that Admission and Institution by the Bishop on Writ, without any Judgment, is all a Nullity, and makes no plenarty. 5. The King cannot usurp without special mention of his intention to be so in his Presentation, not when the Presentation recites it is by Title. 6. When possession hath gone by mean Conveyances, although anciently it be lodged in the Crown, it need not be shewed how it came out per Curiam contrà Maynard, who held, That pleading being the Rule of Evidence, the party ought to shew some Record how it come out of the King: Also Maynard held, That when the King recites any special Title, he cannot usurp, but when the Patent is seu alio quocunque modo ei spectant', he may usurp, Sed Curia contrà. 7. By 13 Eliz. 12. an allowance by the Bishop of any Dioces is sufficient, although his allowance be only to preach within his Dioces, the Statute not requiring any Licence by the Bishop of the Dioces where the Church is. 8. If the Bishop Collates on a Presentation of the King by a mistaken Title, it is void only eis quorum interest, Rud *against* Evesque Carleol, in Hutt. 10. In Ejectment, prior possession is a good Title against the Kings presentation, but in Quare Impedit the Incumbent ought (although Defendant) to make a Title against the Kings presentation without Title, as 7 H. 4. 31. But if the Incumbent be in by Entry of his own head, without any presentation, it's not sufficient in either.

The

The Corporation of Southampton *against* Richards. Ante.

Friday, May 22.

(64) Coron. GOdard moved for the Defendant for Costs, the Plaintiff having abated his own Action, which (being on demurrer) the Court on 23 H.8.15. §.1. N.7. denied, as not within the Statute, which extends only to Nonsuits and Defaults, which the Clerks agréed to be the course: Also the Plaintiff discontinued by leave of the Court, &c.

Baker *against* Berisford. Ante.

(65) Rent. IN Debt for Rent, The Defendant pleaded payment of part in barr, and concludes in Abatement quod Billa cassetur. The Plaintiff replys, Quod non solvit, and tenders Issue thereon: To which the Defendant demurred, and the Plaintiff joyns in the demurrer; and, per Curiam, this is a Plea in barr; and although the Conclusion be quod Billa cassetur, yet it's peremptory after Issue tendered. 2. By the Defendants demurrer, he agrées that nothing was paid. Judgment for the Plaintiff, Nisi.

Hathway *against* Glascocke.

(66) Trover. TRover de uno pare Igneorum ferreorum, Angl. a pair of Andirons, in Arrest of Judgment, the Court conceived it well enough. And so 2. de uno pecio Ferri, Angl. an Iron Crow, held well enough.

(67) Verdict. THe Court refused to insert Déed into Special Verdict, for fear of attainting the Jury, although Archer, the Justice of Assize, certified it was given in Evidence, but it was left out of the Notes of the Clerk of Assize, and there was no Agréement appeared at the Trial to draw up whatsoever might bring the Point in controversie to the Court, ex motione Stroud Jun.

Sprake

Sparke *againſt* Sir Hugh Middleton.

MR. Aylet having bæn Counſel foꝛ the Deſendant, deſired to be excuſed to be ſwoꝛn on the General Oath, as Witneſs foꝛ the Plaintiff, to give the whole Truth, in Evidence, which the Court afterſome diſpute granted; and that he ſhould only reveal ſuch things as he either knew beſoꝛe he was of Counſel, oꝛ that came to his knowledge ſince by other perſons, and the particulars to which he was to be ſwoꝛn were particularly pꝛopoſed, viz. What he knew concerning a Will in queſtion that Poyns Gorge made; and the Court only put the queſtion, Whether he knew of his own knowledge. (68) Proof. March. 83. pl. 136. Stiles 449. pl. 1000.

In Cuſtom, Br. 44. Wiſeman *againſt* Cotton. Ante.

Saturday, May 23.

WIndham conceived beſoꝛe, that this Special cuſtom of Gavelkind was but one of the cuſtoms uſed in Kent, who kept their Lands and cuſtoms frée, and have them as the common Law of the Country, and that this to deviſe was another. But now he held this cuſtom to deviſe dependant on that of Gavelkind, which compꝛehends all the cuſtoms of Kent; although in common parlance and ſtrictneſs it ſignifieth only the departibility; and all manner of pleading is, That the cuſtom of Gavelkind talis eſt, &c. And had this Act of 2 Ed. 6. been general, that all the Lands of the Tenure, oꝛ nature of Gavelkind, ſhall be diſgaveld, it had ſwept away all other incident Cuſtoms: But the Act doth after reſtrain the penning to the particular cuſtom of being departed, oꝛ departible; it takes away that only which he grounded on the Rule, 8 Co. 154. Quando Actus continet generalem Clauſulam, & poſt deſcendit ad ſpecialia, as 2 Inſt. 287. the Expoſition ſhall be accoꝛding to the ſpecial Clauſes. 2. Had the Parliament intended to take away the whole bundle of cuſtoms, they would have had ſome other general woꝛds, as all other cuſtoms, whereas this is only of the cuſtom in the ſingular number. I agrée the Tenancy of that nature is changed by Eſcheat, where the Seigniozy is of the nature of Knights Service, but I do not conceive the nature oꝛ cuſtoms are gone by coming into the hands of the King. 3. This was the cuſtom that was looked on as moſt miſchievous, and they that with their Bows in their hands endeavour, and would have ventured their Blood (67) Rents.

to maintain their customs, cannot be intended to be Petitioners to have them abolished, as a benefit to them. And 31 H. 8. cap. 3. mentions no other custom than this; and 25 H. 8. a private Act; and this of 2 Ed. 6. points principally at this, as the only custom that is deciphered, by General pleading the Lands are Gavelkind, as 1 Cr. 561. Laundre, & 5 Ed. 48. & 2 Ed. 4. 18. are misprinted doubtless; for they may alledge any other customs, as of Dower, Tenancy by Courtesie, &c. and so conclude for the Defendant, That the Lands remain still devisable, and only this single custom is taken away.

2. Twisden (of the County of Kent) ad Idem; but held this custom part of the Soccage Lands in Kent, and Gavelkind another part, as appears by the Etymology of the word from (Gave all Kine, i. e. among all Males, L. Co. 140. and Cowel's Interpreter) others from Gaffall, i. e. tributum, and so Gaffall Kind signifieth such Lands as pay Rent, i. e. Soccage Lands, and fix the Custom to the Lands; but none make this a custom, to which all the other customs are incident. 2. If the customs be incident to the Lands, as Gavelkind, then all Gavelkind must have this custom, which they have not 26 H. 8. 4. Baron Henden, that broacht this custom of devising, doth not fix it there. 3. The pleading Gavelkind sheweth it discendable, but all other customs as Tenancy by curtesie, &c. must be prescribed for as aunciently used: And Learned Men in all Ages having thus understood, 5 Ed. 4. 8. and 2 Ed. 4. 19. Its sufficient for us to ground our Opinions on, although the Books be misprinted; and there is no Gavelkind but is departible, and so it need not be particularly pleaded: And for these Reasons, I conceive, these several customs incident to the Soccage Lands in Kent, as opposite to Knights Service, Old Mag. Chart. 140. and Lamb. Peramb. 541. Gavelkind is sometime taken for Gens born in K. Villinage, F. 46. 18 H. 6. cap. 3. Also F. N. B. 198. must be understood, that of such Lands in Gavelkind, as is devisable, an Ex Gravi Querela lyeth: And F. 144. is not any Authority against this: Also if Lands of this nature discend to the King, they remain of the Nature of Gavelkind, as Pl. Com. 247. grounded on 35 H. 6. 18. by Moil, which Opinion is mistaken by South, but not so when the King purchaseth Lands, he is thereby seised Jure Coronæ, and the eldest only shall have it, but admitting this custom incident to Gavelkind, yet this Act 2 Ed. 6. hath altered only this particular of discents, as the only mischief, of which Coke, who read 30 Eliz. could not but know, by the Relation of some of those Gentlemen, who procured this Act, of which 31 H. 8. cap. 3.

was

was a leading way: Alſo to all intents and purpoſes muſt be expounded only in point of diſcent, as 7 Ed. 6. cap. 1. on which Pl. Com. in Stradling *againſt* Morgans Caſe Reſolved that notwithſtanding the Generalty of the words Any Receiver, yet they expound it only according to the particular miſchief, which was default of payment by the Kings Receiver. Mallet ad Idem; ſo Foſter Chief Juſtice, and that all Acts, reſtraining of the Common Law, are taken ſtrictly in the point of reſtraint. Judgment for the Defendant.

Broom *againſt* Cunningham.

(70) Aſſumpſit.

IN ſpecial Action upon the Caſe, the Plaintiff counted on diſcourſe betwixt the Plaintiff and the Defendant, concerning the Rectory of P. and of a Leaſe made thereof by Poulton to the Defendant, and agreement betwixt them concerning reparations the Defendant was to make on the premiſes, and a Judgment had by one Hull, under whom the Plaintiff claims one Moiety of the Manor and Rectory, whereupon the Plaintiff and the Defendant agreed the Defendant ſhould enjoy, diſcharged of Rent, till he were ſatisfied for his Money ſo to be laid out, and the Plaintiff aſſigned Breach, in that ſuch a day Rent was Arrear, and all the diſburſements before ſatisfied; for which cauſe the Defendant demurred, the Agreement being to allow quod Expenderet, the Count only quod Expendiſſet, which, per Curiam, is well enough.

Judgment for the Plaintiff.

Player *againſt* Petit.

(71) Trades.

ON Habeas Corpus cum cauſa, Wild prayed a Procedendo the Priſoner being ſued in London in debt, on By-Law againſt the Defendant, for taking Forreigner in the Trade of an Upholſterer, who had never been Apprentice to any, nor ſerved as ſuch to the Defendant; which the Court conceived grantable, although the By-Law did alſo inflict Impriſonment on Conviction by two Witneſſes, or Confeſſion, which quoad that, is void: Alſo this Law was made by the Mayor, Aldermen, and Common Counſel, and they were to have ſhares in the Penalty on Recovery, and the Suit was before the Mayor and Aldermen, which per Curiam is well enough. 3. The By-Law was, that on Confeſſion or Recovery on Tryal, the Mayor, &c. may commit ſuch perſons, which had the Habeas Corpus been brought before any Judgment, all had been void, but now Recovery ſhall be intended

tended by Judgment, one being but Convicted by Verdict. Adjornatur.

Bulstrode *against* Hall.

Monday, May 25.

(72) Sewers. IN Evidence to a Jury, Windham conceived one cannot prescribe for the Kings Inheritance, viz. for Lands betwixt the High and Low-Water-Mark, or infrà Fluxum & Refluxum, as he said had been held on Special Verdict in the Exchequer, contrà for Goods wreck, &c. Twisden doubted on Constables Case, 5 Co. 107. but, Glyn *against* Maynard, held they might prescribe.

Pits *against* Viner.

(73) Ejectment. WIld prayed an alias Distringas, the Plaintiff being nonsuited at the Assize for default in the Warrant of the Justices to try the cause, viz. for not confessing Lease, entry & ouster, &c. And that the Non-suit might not be Recorded, which the Court granted on Aquila Wicks's Case, 1 Cr. 203. pl.

The King *against* Mayo. Siderf. 144. pl. 26.

(74) Slander. PEr Curiam to say to Justices in Session, That though I cannot have Justice here, I will have it elsewhere (certified by the Justices to be contemptuously) is a contempt, and the Fine of 5 l. well imposed therefore. Twisden doubted the words were no more, Then that he would appeal; but on paying his Fine in Court, the Court discharged him.

Shepherd *against* Lloyd.

(75) Trover. ON Judgment by default, Error was assigned in Trover of twenty pieces five parcellis ligni, which per Curiam is well enough, as Pophams Case, Trover of twenty Trées, which cannot be now intended such as are growing, and piece and parcel is Synonimous; contrà of a parcel of Wares that is uncertain; but parcel of Cloath is well enough. Judgment Affirmed, Nisi.

Baker

Baker *against* Berisford. Ante.

Mich. 14 Car. 2 Rot. 1430.

IN Debt for Rent, the Plaintiff counted on custom of Mannor, that Moiety of Rent on Lease of Copyholder shall go to the Wife, and Moiety to the Son, if he dye seised of the Remainder, and that she claims Moiety as Free Bench. The Defendant pleaded payment of a lesser Sum in satisfaction of the Rent. The Plaintiff offers Issue thereon: To which the Defendant demurred; which, per Curiam is frivolous: But the point intended was, whether Tenants in Common may sever in debt for Rent, which the Court conceived they might, especially on such particular Custom. Judgment for the Plaintiff. (76) Rent.

Queens Colledge.

IN Trover for a Horse, the Defendant Justifies, ut bona Wai viata, by Patent, not shewing it forth, nor shewing that any Felony was committed, which, per Curiam, he ought to do, as by Foster in the time of Queen Eliz. hath been adjudged. Judgment for the Plaintiff, Nisi. (77) Trover.

Peesley *against* Friend.

Tuesday, May 26.

THe Act of the Court, without shewing the Letters of Administration under Seal, is a sufficient Title for the Administrator to claim Goods by, as well as for any third person, per Curiam, as in the Lord Manchesters Case. (78) Administrator.

Knap *against* Blumfield.

IN Evidence to a Jury, it was held, 1. That Entry of J.S. on the Land, (after Lease made by him in Reversion) shall not be intended by disseisin, being so only at the will of him in Reversion: But if it were by disseisin, then a Release made after to the Lessee is no Enlargement of his Estate. (79) Disseisor.

Leakins

In Diſceit, Br. 24. Leakins *againſt* Clizard.

Wedneſday, May 27.

(80) Market Overt. Siderf. 146. pl. 3. JOnes moved in Arreſt of Judgment in Action upon the Caſe, the Count being of a Communication to ſell a Houſe, and that the Defendant affirmed the Rent thereof to be 42 l. per Annum, fraudulenter, not ſaying ſciens it was leſs. To which the Plaintiff fidem adhibens, as Young *againſt* Harvy, Yelvert. 20. and Mich. 40 Eliz. pl. 31. bought the Houſe, which was but 36 l. per Annum, which, without any ſpecial warranty, is not actionable. Windham conceived the Action lay with this difference, That it is of a thing valuable; contrà of Jewels, &c. for therein Perjury cannot be aſſigned, to which the Court inclined. Adjornatur.

Bulſtrode *againſt* Hall.

(81) Trials. FInch Solicitor, moved that Trial begun Termino Paſchæ, and adjorned, for a View might be finiſhed in Trinity Term, which Windham conceived he muſt; ſo Foſter: contrà by Twiſden, yet conceſſum eſt.

Hen *againſt* Hamſon. Ante.

(82) Rents. Bridgman 124. in Mittons Caſ. its held ſuch Releaſe is a good barr. So it is of Rent-charge, although nothing be Arrear. 20 Aſſ. 5. POultnee for the Plaintiff on demurrer, conceived a General Releaſe of all Demands, made in purſuance of an Award of particular differences, is no barr of Covenant to pay Rent, becauſe till the Rent day, 1 Inſt. 510. it's not demandable, as Althams Caſe. Alſo this differs from Wotton *againſt* Bye, 2 Cr. 483. which is of a Releaſe by Grantee; but this is made by him in Reverſion of Rent incident thereto, and done to another intent, 2 Cr. 170. Hancock *againſt* Field, which ought to guide; and 2 Cr. Clun *againſt* Fiſher, is, that ſuch Releaſe after Mich. and within ten days, of Rent payable within ten days, is held no barr; and according Hedley 15. in Annuity. Jones for the Defendant after Oyer, that the Arbitrement being of ſeveral differences, his intent cannot be intended otherways, but that this Rent was in controverſie, unleſs he had particularly averr'd the contrary. 2. There is no difference betwixt a Rent of Inheritance, and a Rent incident to a Reverſion: And although ſuch Releaſe barrs not the King, as 6 H. 7. 15. yet a common perſon

perſon it doth: And 14 H. 8. 9. per Pollard, by ſuch Releaſe the uſe of a Rent is gone; this Releaſe doth not increaſe the Leſſees Eſtate, but only diſchargeth the Rent, and the Fealty and other Services remain. And although it be not demandable, yet it may as well be diſcharged as a Common, of which one cannot be diſſeiſed, unleſs he will. Windham conceived this Releaſe barrs not the Rent, as Poultnee had argued in both Points with the ſame difference, this Rent being part of the Reverſion, and within the Statute of Donis, and not like the Caſes of Common or Rents in groſs. And this word Demand hath been always reſtrained ſince Littletons time, as Moor 34. it barrs not future Covenant. 2. Theſe words in company with others muſt be reſtrained by them, as Dy. Power given to Executors to diſpoſe, let, ſet, &c. doth not impower them to ſell. 2. Twiſden contrà; and that no difference is betwixt this and Littleton, §. 510. for the Rent betwixt Lord and Tenant is always in demand; and ſo betwixt Leſſee and H. in Reverſion: And this 20 Aſſ. 5. 14 H. 8. 9. is ruled, although no Rent be arrear at the time of the Releaſe. 3. This word is put in to the reſt to inlarge them, not to be reſtrained by them. 3. Mallet agreed with Windham, that it's not releaſed: 4. So Foſter; and that if Demand ſhould be extended in the largeſt ſenſe, it would diſcharge the Reverſion it ſelf, which is a continual Demand on the Leſſee. 2. The intent, as in 2 Cr. Hancock *againſt* Field, in Covenant to Repair, muſt guide; which as there, ſo here, cannot be collected to diſcharge the Rent. Twiſden agreed that it could paſs no intereſt, only operate by way of Extinguiſhment. Windham alſo, that a Seigniory in groſs might be diſcharged by ſuch Releaſe. Judgment for the Plaintiff, Niſi.

Siderf. 151. pl. 19. Hooke *againſt* Swaine.

(83) IN conſideration of Marriage had with the Defendants Daughter, he covenants to grant to the Plaintiff 20 l. a year, which Powis for the Plaintiff, as 21 Co. 24. Baldwins Caſe, 8 Co. 83, 85. conceived an Eſtate for Life in the Plaintiff, which the Counſel for the Defendant agreed in caſe of Grant; but on bare Covenant, as this Caſe is, to grant, which being for Affection to the Daughter, would be more beneficial to the Husband than her: And this may be as well intended as a Leaſe for years is ſatisfied with two years. Twiſden conceived ſuch Reſervation of 20 l. Annuity per Annum, is Rent.

is for life of the parties; so here in Covenant, according to common parlance, and the consideration is intended to continue, unless the contrary appear, to which the Court inclined. Adjornatur.

Hall *against* Cresswell. Ante.

(84) Covenant. IN Debt on Bond, the Condition was to perform all Covenants in Lease made by her Husband of a Warren, rendring so many Conies; one whereof was, to do no act to disturb the Lessée: She after taketh another Husband, who entred on the Plaintiff, and cut the Nets (no Title being shewed by which he entred) for which cause the Defendant demurred. Judgment for the Plaintiff, Nisi.

Departure, Br. 10. Mould *against* Wallis. Ante.

(85) Trades. Siderf. 142. pl. 19. THe Court gave leave to the Plaintiff (notwithstanding the Opinion of the Court) to discontinue his Action; and rather then hang up longer, begin de novo, and counted on the custom of London, that an Infant may bind himself Apprentice.

Whitehead *against* Brown. Ante.

Hill. 14 & 15 Car. 2. Rot. 238.

(86) Lieu. ACtion upon the Case, quod cum indebitatus fuit infrà Jurisdict. Curiæ pro nutriendo (not saying where) a Child of the Defendants, the Defendant promised within the said Jurisdiction: It was assigned for Error, that no place of the nursing was mentioned. Adjornatur.

Debt, Br. 79. Foster *against* Halliman.

(87) Assumpsit. 1 Roll. 20. §. 14. IN Action upon the Case on promise by the Defendant, that if the Plaintiff and J. S. do agrée of a price, he would pay on communication of the Sale of a House, of which the Defendant having notice, promisit, &c. to which promise the Plaintiff fidem adhibens, did agrée, &c. After Verdict in the Palace Court, it was assigned for Error, that here is no sufficient Consideration, no mention being made that the Agréement for the price was ad specialem Instantiam of the Defendant: But the Court inclined it was well enough; but the promise being on Record, That if the Plaintiff and J. S. do agrée

gree for the House that he should be paid, which being a voluntary leaving the Sale to the Plaintiff, it's no sufficient consideration. Adjornatur.

Prisland *against* Cooper.

(88) Deeds.

IN Action of Covenant, the Defendant demands no Oyer, but pleads quod in Articulis illis ulterius continetur, &c. which, per Curiam, as Smith *against* Sir John Boucher, Hutt. is ill, and his shewing the Counterpart is not sufficient; but the whole Indenture ought to be in Court. Judgment for the Plaintiff, Nisi.

Error, Br. 13.

(89) Error.

ERror to remove a Judgment Coram Justiciariis nostris de Banco, and the Record is Coram Archer & Atkins Justices of the C. B. which, by Jones, is ill: And the Writ ought to be specially to Archer and Atkins Justices in C. B. they being Judges in the Change of Government: And so by Jones for the Plaintiff, when Judgment had in the Upper Bench is pleaded, they never say in Curia nostra; but per Curiam, it's well enough. Adjornatur.

Dorrington *against* Slipper.

(90) Lieu.

ERror of Judgment in Palace Court in an Indebitatus infrà for Wares venditis et deliberatis, not saying where: The Defendant promised to pay infrà Jurisd. which, per Curiam, is Error, the Debt arising on the delivery, which must shew place certain. Judgment Reversed, Nisi.

Philips *against* Slipper.

Tr. 14 Car. 2. Rot.

(91) Lieu.

IN an Action upon the Case upon Indebitatus in the Palace Court, and promise there to pay pro diversis Mercimonijs ante tunc venditis, after Judgment, the not shewing where the Sale was, assigned for Error. Adjornatur.

The King *against* the Inhabitants of Yarnton. Ante.

Saturday, May 30.

(92) Variance. THe Issue being by Special Agreement, and that the Plaintiff should refund Mony disbursed by the Defendants in repairs of the High-Way, by Order of the Court, the Court conceived the Verdict well enough, although it be not found who ought to repair. Judgment for the Defendant.

Lord Stanford *against* Needham Siderf. 143. pl. 20.

(93) Slander. March. 155. pl. 224. IN Action upon the Case on 2 R. 2. De Scandalis Magnatum, after Judgment, Wild moved that no Writ of Error should be allowed in the Exchequer Chamber, which was granted: And per Curiam, it lyeth not, nor is this Action within the Statute of Limitation, as was resolved in the Lord Sayes Case.

The King *against* Judaicum Mayes. Siderf. 143. pl. 23.

(94) Merchants. ON Habeas Corpus, the Return was only of Commitment by the Secretary, till his Majesties further pleasure be known: But now the Attorny General informed the Court, that by the custom of Portugal, all Traders thence to Brazele, in Return ought to touch at Lysbon, and the Prisoner had come immediately from thence to England, where the Embassador complaining at Counsel, the Prisoner submitted to pay all the duties, and now refused; and the Embassador having gone without libelling in the Admiralty, the Kings Counsel conceived it a matter of State, and the King would send him into Portugal: And in Plagues Case, Moor, a Prohibition was for the like cause refused, the Court would not let him go, without sufficient security to answer Information in this Court for cheating the King, in regard the King of Portugal intends to reprise it, and defalke it out of the Queens Portion. Adjornatur.

Fen

Fen *against* Driver. Ante.

ACtion upon the Case for impounding the Plaintiffs Horses, per quod he could not have in certain Loads of Hay out of the Field. After Judgment by default, and Writ of Enquiry unfiled, the Defendant mended, by adding a a new Defendant, whereby the Defendant could not assign that as Error, Fitzh. 40. which he had done, Judgment finally being (as by the course of the Court it may) before the filing the Writ of Enquiry. Adjornatur. (95) Action upon the Case.

Parre *against* Evans. Ante.

PEr Curiam, all the security in the Court of Admiralty is by Bond to the party, not by Recognovit se debere to the King: But by Wild, this Stipulation is only an Entry that the party acknowledgeth to owe 1000 l, &c. without Seal, or any person certain to whom, which is contrary to the auncient course; which was not of Sum certain, but only to perform the Award of the Court on Condemnation of the party. Adjornatur. (96) Admiral.

Baker *against* Berisford. Ante.

A Baker possessed of a Term, dyed intestate, J. his Administrator Leased to Berisford the Defendant, wherein were Covenants to repair, &c. The Plaintiff, as Executor of J. brings his Action, averring payment of debts by the Administrator to the Value of the Lease; on which the Defendant took Issue, and Verdict for the Defendant, which Allen moved to set aside, the Jury being induced thereto by the Information of Snow, one of the Tales, whose Evidence lead the first Verdict also, and a party concerned, which was not regarded. And though the Judge that tryed the cause declared himself not satisfied with the Verdict, yet they granted no new Tryal. Wherefore Allen moved in Arrest of Judgment, that the Rent reserved on this Lease by the Administrator, doth not go with the Reversion to the Administrator, de bonis non of A. and so the Issue is imperfect; and there ought to be a Repleader, as was Rolls Opinion, when he left the Bench. 2. The Issue on the value, must be intended to go only to the Term, and not to the value of all: For so if one possessed of a Term worth 1000 l. and Goods of 10 l. and the Administrator pay 999 l. no appropriation of the (97) Rents.

Term shall be made, which is unreasonable. Wild for the Defendant, when the Administrator hath paid but part of the value of the Term which he made (although it be more then the Goods) yet there can be no appropriation of the Term. Twisden conceived, that on Lease by the Husband of part of the Term, of which he is possessed Jure uxoris, the Rent shall go with the Reversion, and not to the Executors of the Husband. Adjornatur.

March. 88. pl. 141.

Pricard *against* Laurence. In Dures Br. 1.

(98) Dures. IN Issue on Bond made per minas vitæ & mutilat' Membrorum, the Jury find that it was per metum imprisonamenti, which, by Coleman, in debt, is sufficient to avoid the bond; Minas being the principal, as the Tenure, Yelverton 148. Twisden conceived this had been naught in Trespass of Goods, and that the special manner of Dures ought to be pleaded: The Court inclined that here the Dures ought to be specially pleaded; but the Verdict being, that the Plaintiff threatned quod Imprisonaret Deft. & Crimen feloniæ ei imponeret, Nisi, which, per Curiam, is ill, being no more then by Law, he may charge him with. Adjornatur.

Glanvill *against* Gullen. Ante.

(99) Slander. JOnes for the Plaintiff, conceived the words Actionable, as M. 32, 33. Eliz. Pool *against* Nichols adjudged that to say, H. is a Rebel against the Queen, B. R. Rot. Curia contrà, Sed Adjornatur.

(100) Mony. IN Action upon the Case; pro quantum meruit pro mille mensuris (vini Rhenish) Anglicè Gallons of such a value, which, per Curiam, is well enough; contrà in Trover. Judgment for the Plaintiff.

(101) Slander. IN Action upon the Case for words spoken at several times, part Actionable, and part not; the Jury find Intire Damages, (which was moved in Arrest of Judgment) and Jones for the Plaintiff, prayed Venire facias de novo on this insufficiency of the Verdict, to which the Court, Twisden absente, inclined. Adjornatur.

Hooke

Hooke *against* Swain. Ante.

IN Action of Covenant, which was for payment of the Sum of 20 l. per annum by quarterly payments, on Marriage agreement: The Defendant pleaded payment for one year, and for the rest demanded Judgment si, &c. the Court conceived the duty to be during Life of the Grantée: And had it been to pay Rent, it had been clear so; but being only of the Sum, &c. Adjornatur. (102) Rents.

The King *against* the Justices of Somersetshire. Ante.

FOster moved to continue a Procedendo (which after Certiorari filed per Curiam, is regularly granted) and to supersede a Certiorari on Order of Sessions to place an Apprentice with a Draper, in the Corporation of Axam, in regard he fermed Lands in the same Parish, which, per Curiam they may, but not unless he be a Fermer. Also its ordinary on Void Procedendo, or after its determined, to grant a new Certiorari; but contrà of new Habeas Corpus after a Procedendo. Adjornatur. (103) Trades. ante 420. p: 130.

Dr. Kings Case of Colemanstreet.

ON Mandamus directed to him to swear the Churchwarden, reciting one before sworn; Winnington on 15 Car. 1. Rot. 44. Warners Case moved that he might be excused, in regard if he should swear him, another being peaceably in, his superior will punish him: But per Curiam, they cannot punish for obeying the Kings Writ; and this being a contest betwixt the Parishioners about the Custom, Windham conceived the Official may as well swear the last, as well as the Bishop may admit several, to the intent the parties may be both made capable to try the right, which the Court agréed, and granted a Mandamus. Nisi. (104) Church.

The King *against* Parsons.

ALlen moved to quash an Order made by the Sessions for keeping a Bastard Child, which was made on Appeal from Order made by the two next Justices, in which the security by the Statute is lyable to perform the Order of the Sessions, although the former Order be quasht, which Order, being that the party shall abide the Order of the two next (105) Bastard.

nert Justices de novo; he conceived it illegal, the party having appeal'd from them: But the Court held it well enough, and that the party pay the Mony till the Order be quasht, and they would not hear any Exception, till the party appear in person.

Leakins *against* Clizard. Ante.

(106) Market Overt. WInnington moved for Judgment in Action upon the Case, for falsly affirming Rent of Houses to be more then it really was, on Communication of the Annual Rent of certain Houses, which the Plaintiff intended to purchase; had it been of Rent-Charge, the Action would doubtless lye; and here its said falso & fraudulenter: And by Allen this differs not from the common case of affirming Goods sound that were Rotten: But by Wild for the Defendant, there is no Averment that the Defendant sciens that the Rent was less; And per Curiam it cannot be said fraudulent, unless it were Sciens, &c. Adjornatur.

DE

DE TERMINO Trinitatis,

15 *Car.* II. *B. R.* Die Veneris, Junij 19. Anno 1663.

Foster *Chief Justice.*
Mallet, by reason of Age, was discharged last *Tuesday.*
Twisden,
Windham.

Foster Lessee of Coxe *against* Nortliff.

IN Ejectment, the Solicitor moved for the Defendant to be admitted Defendant, and to stay a Trial, both parties claiming as Husband to the same Woman, who is actually the Wife now of N. the Defendant, (and there was a Suit pro Jactitatione Matrimonij by the Wife in the Spiritual Court, as soon as any Claim was made by the Plaintiff.) Jones opposed it in regard the Marriage was not immediately sued for in the Spiritual Court, but only the Scandal, which can be no cause to stay the Suit at Law: But per Curiam, the first point of this motion being to be made Defendant, the rest is improper till pleading. But, by Twisden, this is no cause to stay the Trial. Adjornatur. (1) Baron & Feme. Britton. 259. b must try marriage in Court Christian first.

Ante

Ante.

(2) Admiral.

BRown on 13 R. 2. cap. 5. and on 15 R. 2. cap. that all things arising within the Body of the County, shall be tryed at common Law, and not by the Admiral, prayed a Prohibition, those Statutes being made to that intent, to restrain the Admiral from all Jurisdiction on the Land, and confine him to matters only done on the Sea, and are declaratory of the common Law: And the surmise that things were on the Land, is sufficient for a Prohibition, notwithstanding the Allegation in the Libel be, That it was done on the High Sea. Wild the Kings Serjeant, for the Defendant, agreed all said, but nothing to this Case, which was, Ell Master of a Ship takes up of Parker at Lysbon Mony, and pawns the Ship, Ell dieth in the Voyage, Evans succeeds, and Tate received the Freight, and so by the Law of the Admiral was lyable to the Debt: And at common Law Parker is remediless, there being no remedy but against the person by Action upon the Case, declaring on the custom of Merchants, nor that neither. Sed Twisden held he may have such an Action upon the Case: And supposing there be no remedy at common Law, yet if the Contract were made on the Land beyond Sea, the Admiral can give no remedy, which Windham agreed. Tate *against* Tinker in Evidence to a Jury at Guild-hall; impawning of Goods allowable by the Civil Law, is no ground of altering property at Common Law, but it is good Evidence of such a custom of Merchants. The Court directed Issue on the Fact, whether the Contract were on Sea or Land. Post.

Mr. Prin's Case.

(3) Mandamus.

ON Mandamus to the Commissioners of Corporation of Bath, to restore him to Recordship there, or shew cause: They Return that they judge it fitting, expedient, and for the publick good that he be not restored. Adjornatur.

The

The King *against* Stafford.

POwis excepted to the Decrée of the Commissioners of Sewers, made for Repairs of Breaches by Mills, and that he shall keep them flap-wise; and it doth not appear he had any Estate in the Mills. 2. They order, that in case of disobedience to their Decrée, compulsion by distress and imprisonment without Bayl, which, Callis Reading 133. is against Law, unless on any contempt done in open Court. 3. They order the holes of the Gates to be made narrower then they were, which they cannot do on view, but must impanel a Jury, in regard they might be anciently so broad; and here doth not appear any Jury impanell'd. 4. It doth not appear, but that these are ancient Mills, as 10 Co. 138. and so not alterable. The Court conceived the imprisonment to be void; but the other things shall be intended well enough till the contrary appears. Adjornatur. (4) Sewers. Sinderf. 145. pl. 1.

Siderf. 145 pl. 2. The King *against* Needham.

FOster and Windham held this Court undoubtedly may commit a Pickpoquet, taken here in the Hall, to Newgate immediately: But, by Glyn, it's not so proper, in regard of the transferring of Recognizance to Inferiour Court (which is done to the Assizes only, in regard the parties there are never present in this Court.) Twisden conceived the properest way to be, to send for a Justice of Peace of Middlesex, and he to send him by Mittimus: But they committed him to the Sheriff of Middlesex, who carried him to Newgate immediately (5) Coron.

Dr. King's Case, Archdeacon of London. Ante.

A Mandamus was Awarded to swear the second Churchwarden, without any Clause to amove the former, and he shall not be compelled to obey any part, unless the whole Writ may be performed; and so it was set aside. (6) Church.

Brown *against* White. Ante.

Saturday, June 20.

(7) Lieu. IN Action upon the Case upon Indebitatus infrà Jurisd. of the Marshalsey, pro nutriendo filium, not shewing where, which, per Curiam præter Windham, is ill, the Indebitatus appearing to be for a particular cause, viz. pro nutriendo, And therefore it ought to appear, that it was within the Jurisdiction, and is not like the common Case of general Indebitatus. Sed Adjornatur.

Everard *against* Pory.

(8) Churchwardens. JOnes moved for Prohibition to the Spiritual Court, in a Suit against a Churchwarden for Breach of his Oath in 1640. in the Execution of his Office, and taking away a Table of Fees hung up in the Church, whereby the Duties were altered. On Suggestion that the Plaintiff had there pleaded the Act of Oblivion, and notwithstanding Sentence was passed there against him, per Curiam; if this be no Perjury, it's pardoned; and whether it be or not, is to be determined at common Law: But Pridle and Nappers Case is, that it's only a promissory Oath, and no Perjury.

Disceit, Br. 24, Leakins *against* Clizard. Ante.

(9) Market Overt. WInnington moved for Judgment, this being of a certain thing which lyeth in the certain knowledge of the Defendant, it's actionable without any Special Covenant or Warranty, as 42 Ass. 8. 4 Co. 18. b. and this is laid to be fraudulenter. Jones agreed the Rule, but not as applicable to this Case: For to affirm property of Goods in his own possession is actionable, because the Purchaser cannot take notice that the property was in any other: But here the Purchaser ought to take notice at his peril, the thing being certain, and as equal in the conusance of the one as the other. And in 33 Eliz. it was adjudged that no Action could lye on false Affirmation that J. S. had offered him 100 l. for Goods: And so on the daily sale of Horses, affirming them to be good, sound, &c. no Action lyeth without Special Warranty: And the consequence hereof is a boundless inconvenience; for by the same reason the Purchaser may affirm Lands did not contain so many Acres as is expressed, and the fraudulenter intendens to deceive the Plain-

Plaintiff is insignificant, for intent is not triable, but it was farther, fraudulenter asseruit. Windham conceived this Case within the difference put by Jones, and not like the Case put by him 33 Eliz. nor like things of incertain value, which are not actionable. And by Twisden, had it been laid quod sciens that the Houses had been of less value in Rent, he did falsly affirm it more, &c. it had been clearly actionable; and the Jury having found the fraudulenter, it is equivalent with a sciens. As on Sale of an Horse, Harding *against* Freeman, 1653. one affirmed the Horse to be his, and brought up by him of a Colt, intendens fraudulenter to deceive the Plaintiff, which being found, Judgment was for the Plaintiff. So where one fraudulenter affirmed he had power to sell Goods of J. S. which being found at the Trial, in which it's necessary that the fraud be given in Evidence, it was adjudged actionable: So here; Foster ad idem: If one affirm his particular to be true, he is bound to make it so, especially laying the Action that he fraudulenter & animo fallendi did affirm it true. Judgment for the Plaintiff.

(10) Prohibition.

Richardson moved for a Prohibition to the Consistory Court of Exeter, in Suit for Pension due by Prescription, which, by Jones is not within the Statute of Circumspecte Agatis, as 2 Inst. 493. & Prescript. F. 91. Windham on this very point remembred a Case before my Lord Coventry, Ruled according to this difference, but he always thought the party had Election of Court, as F. N. B. Consultation: And this Case is betwixt Churchwardens of several Parishes which are not a Corporation to this purpose: But by Windham, this makes the Case against the Plaintiff in the Prohibition, for this may be well by constitution, and is in proper conusance of the Ordinary. And in the former Case it was ruled that the Vicar must sue in the Spiritual Court for Indowment with such an Annuity. The Court doubted the former point, but upon the last they refused any Prohibition.

March. 105. pl. 181. no Prohibition for priority of Suit.

Clerk *against* Newton.

(11) Trover.

Trover de Trecentum uvarum, with an Angl. Currans, which, per Curiam, is well enough after Verdict; as 100 weight of Goods, or Centum ponderibus. 2. Centum & duobus quarteriis, unius Centenæ, uvarum passarum, Angl. Raisons, which 1 Cr. 33. is held well enough with Angl. pound weight. And this word Centenæ (although no particu-

lar damages be found) goeth to three parts of four of the charge. Adjornatur.

Wareham, Ante.

(12) Slander. ON insufficient Damages found for words, part whereof are actionable, and part not, Jones prayed Venire facias de novo, which the Court conceived fitting, although the inconvenience would then be, that in Trover, as in the Case before, where any part is insufficiently found, such Venire facias would be taken. Adjornatur.

Price *against* Roberts.

(13) Wales. WIlliams moved for a Prohibition to the Marches of Wales, suggesting that on English Bill against Executors, on penal Bond for 30 l. for payment of 15 l. they gave 15 l. debt, and 15 l. damages against them, to be levied de bonis propriis, which he conceived was illegal, although within their Instructions, as Sir H. Williams's Case, 1 Cr. The Court conceived these proceedings (had they been against the party himself) void, and not grantable by the King, no more then Grant to Oxon, to have conusance according to the Civil Law, which had been void without Act of Parliament. The Court stayed Proceedings till the Attorney General be informed, &c.

The King *against* Vaughan.

Monday, June 22.

(14) Force. COleman excepted to an Indictment of Forcible Entry, being quod per Sacramentum duodecem prob. et legalium hominum de Corpore Comitatus, yet it begun ad Sessionem General. Pacis tent. in Comitat. pro Comitatu prædict.) 2. It said not Onerati et Jurati pro Domino Rege, &c. And so it may be but a Petit Jury. Windham absente. Post 525. pl. 17. Adjornatur.

Henacre

Henacre and Bets *against* .....

YOur Daughters are Whores, and play the Whore for their Silk Gowns, and are J. S's Whores, with Special Damage. Scrogs moved in Arrest of Judgment, that the persons are incertain of whom the words are spoken, in regard she might have more Daughters: So Slocombs Case, 1 Cr. & Tr. 14 Jac. Rot. 41. Bulstr. part 3. Barwell contrà, as Wiseman's Case, 2 Cr. the Court will not now intend she had other Daughters: And, per Curiam, it could not be better laid, the Innuendo being of the Plaintiffs; and when words are spoken in the Plural Number, all may bring Actions; but when they are in the Singular Number, as Your Son is a Thief, it hath been a doubt long controverted for the incertainty; but they must have several Actions, and cannot joyn. Judgment for the Plaintiff, Nisi. (15) Slander.

The King *against* Pritchard.

NOta per Curiam, as course on the Crown side, that till the King make default in Trial where the King is party, &c. the party cannot stir or hasten the Cause, nor after his default without leave of the Court, or licence of the Attorney General: And this in an Information of Perjury in Casu Gerrard *against* Phitton, wherein the King's Serjeant moved the Defendant might not hasten the King till all the Defendants had pleaded, but the Court refused such order; but conceived that although the Suits be several, yet the King may have a joynt Venire facias. (16) Trial.

The King *against* Vaughan. Ante 514. pl. 14.

Tuesday, June 23.

COleman Excepted secondly, That the Entry is said with Force into one Messuage, and the Detainer is said to be de tenementis prædictis, which, by Windham, being a Relative thing, is well enough, which the Court agreed; and inclined the first to be well enough, being only the Title of the Inquisition. But 3. it was quod expulit de tenement. existent (not saying ad tunc) liberum tenement', &c. quasht. (17) Force.

Serjeant

Serjeant Keeling.

(18) Judges

My Lord Chancellor Hide made a Speech to him, That the Kings pleasure was to call him to be a Judge in this High Court of Law; not in the usual Circumstance of Death or Vacancy, but in the place of one living, who was dispenced with, *viz.* *Mallet*, on his Petition, by continuance of his Salary under the Great Seal, not by Writ of Ease. This is the great gift of God unto Kings to Judge the People; and the King cannot delegate a greater part of his prerogative, then this taking a Subject to himself in Commission to Judge his Fellows: And the Judgment being Gods, he is to take heed (and as incomparable *Grotius*) there is no more misbecoming thing to a Christian Man, then seeking to be thus like God, to dispose of the Blood of Subjects: But I absolve you, Mr. *Serjeant*, from any thing of this kind, in that you could have no thoughts of it, till I brought the Kings pleasure to you; and then you received it only with such alacrity, as was fit for his service. This the King did in sight of your great Ability and Suffrings, and assurance of Constancy in his Service, of which he had had some Experience before hand; and therefore the people will have great cause to thank his Majesty. Your Experience here is particular, having been a Child of this Court, Educated under an Experienced Father; The iniquity of the times have introduced many Presidents on, otherways Men that might have been of great Ability, as Burning of Peers in the hand, and therefore you must look beyond them: This is the highest Court, and wherein the Manners of Men may be best reformed; you are the Kings Inquisitors to punish all Horrid Misdemeanors, as Duels, *Debauchery*, &c. for which I have sometimes been reproved by the King. I know you are willing to punish, but the Current may be too hard for you, in regard such crimes may be gotten into great company, too hard for the Jurisdiction of this Court; but the King hath specially commanded me to tell you, he will assist you with his Authority to punish such Transgressors. I need not put you in mind of those you leave behind you at the Bar, nor from whence you come, the omission of Discipline in the Inns of Court, being the greatest wound to the Law; and these Courts ought to exact from them all Reverence and Respect, and decency; his Majesties surprising persons (as he hath done you) with such honour, is a sufficient Evidence of his Majesties Clemency, in that he hath done it from his coming in, unto this day, without the least reward

what

what ever, which I can witneſs with a very good Conſcience: And if this cannot introduce a Love and veneration in the people of the Government, nothing but a deſolation can be expected, and doubtleſs the calling ſo intire a Judge hither, will be a great ſupport to the Government.

Keeling.

ALthough I cannot but retorn hearty thanks for ſo great favors, yet when I look on this Supream Court, and its Juriſdiction, I am much daunted; eſpecially when I conſider the ability of the learned perſon I ſucceed; My twenty years ſilence may have contributed to my inability, although not to hinder my Induſtry. I acknowledge the Effluxes of his Majeſties favour to be only by your Lordſhips goodneſs, from which I beg that his Majeſty may know with how much gratitude and humility I receive this favour. And for Fidelity and Induſtry, they ſhall not be wanting.

Then he came into Court, and kneeling at the inner Table, took the Oaths of Supremacy and Allegiance, and of a Judge, Well and truly to ſerve the King in that Office, and truly to Counſel the King, and ſuffer nothing that may be to his hurt, without making it known to him, &c. Then his Patent was delivered; and then he went to his Seat.

The King *againſt* Johnſon.

JOnes excepted to a Preſentment in Court-Leet at Stepney, in that it doth not appear the way is out of Repair, nor that the Defendant ought to repair, it being a common Foot-way, which the Court quaſht, without any Certificate of amendment, contrà of an Indictment. (19) Way.

againſt Stane.

NOta pro Regula, Although it appear on the Body of the Record, that the Cauſe of Action requireth Special Bail, yet without marking the Roll, common Bail may be put in, but for ſpecial Cauſe, the Court on motion may alter it. (20) Bayl.

Drake

Drake *againſt* Beer. Siderf. 151. pl. 18.

(21) Lieu. DEbt in Inferior Court for Rent reſerved, payable within the Juriſdiction for Lands out, is Erroneous per Curiam; as when any part of their inquiry is out of their Juriſdiction, and the Caſe of Hall and Arnold was reverſed. Polyxphen agreed this in Caſe of an Aſſignée of Reverſion, but not ſo betwixt Leſſée and Leſſor, as here, and 1 Cr. 143. Long *againſt* Nethercot, is in Caſe of an Aſſignée of Reverſion. Windham doubted, in regard its not ſufficient that one may plead a Plea that is out, which may be done in any caſe, which Keeling agreed; and this is like ſeveri Counties, in which caſe, on the perſonal contract, the Action may be brought in either. Twiſden agreed this of Counties; but in Inferior Courts, the whole muſt appear to ariſe within the Juriſdiction. Foſter doubted an Nil debet pleaded on Ireland *againſt* Blackwell's Caſe. Adjornatur.

Nelſon, &c. Executors of the Lord Vaux *againſt* Pockleton.

Hill. 14. 15 Car. 2 Rot. 1104.

(22) Aſſumpſit. March. 5. pl. 10. IN Covenant for non-payment of Money, on ſurrender of a Tenant right, made by the Lord Vaux to the uſe of the Defendant, and tendred by the Lord Vaux or his Executors, &c. The Defendant pleaded nul ſurrender: The Plaintiff ſheweth one made to J. S. to the uſe of the Defendant, of which the Defendant had no notice till after the Death of the Covenantor. For which cauſe Newdigate for the Defendant, after Judgment for the Plaintiff, conceived this Error, on the reaſon of 3 Cr. 825. Stutfields Caſe, it being in the Election of the Defendant, whither he will accept it, or not; Windham according: That Averment muſt be expreſly made of notice to the Defendant, and not only ſo, but of his acceptance, or aſſent, or tender to him. Twiſden remembred a caſe about twelve years ſince, that where one was to be bound to J. S. he delivered Bond to A. and his uſe, and held void unleſs A. tendred the Bond to J. S. But the Court inclined the Executors may tender, as this Caſe is, the ſurrender wanting nothing but delivery of the Deed: And it being averr'd that they did ſo, they had performed the Covenant, but an Accord was offer'd. Adjornatur.

Smith

Smyth *against* Smith.

Thurſday, June 25.

ERror of a Judgment in Dower, in that the Proclamation §. 1. is ſaid to be at H. in the Spring, and it doth not appear that that is within the Parish of W. H. where the demand is: But by Weſton for the Defendant, This is cauſe why no Grand Cape ſhould Iſſue by 31 Eliz. 3. but is no cauſe of Error. 2. That Judgment was Ideo conſideratum eſt, and doth not ſay per Curiam, which being in Durham, which hath Jura Regalia, its well enough; contrà of other Inferior Courts, as Ely or ſuch like, that are no County Palatines and Twiſden cited Judgment Reverſed accordingly: So Thin *againſt* Thin. Judgment Affirmed. Niſi. (23) Dower. 3 Cr. 472. pl. 35. Sinderf. 147. pl. 5. March. 7. pl. 16.

Jones *against* Clement.

POwis prayed a Prohibition to the Marches of Wales on; 11 Co. 5. b. Haydons Caſe; Damnages in Joynt Action of Treſpaſs againſt ſeveral were aſſeſſed, ſo much for one, and ſo much for another, which being done by the Court, in place of the Jury, and alſo not given Jointly, is ill. Twiſden doubted whither they can hold Treſpaſs by Engliſh Bill, although it be ſaid they may hold Debt: Windham conceived, that unleſs pleas had been Aunciently uſed there, they had no power by 27 H. 8. and that is but in ſuch manner as aunciently uſed, which could not be by Engliſh Bill: But by Keeling, they never proceed any other way but by Engliſh Bill. Foſter would firſt ſee their Inſtructions, before he would give Opinion: All granted, the King by Patent cannot Erect a Court of Equity; but in regard theſe were troubleſom places, cauſes were referd auncientlÿ to the beſt of the Lord Marcher, which proceedings were after confirmed by the Statute: All things ſtaid till the Inſtructions come in. (24) Wales.

Holdy *againſt* Hodges.

(25) Siderf. 147. pl. 6. IN Ejectment of Lands in the Parish of Long-hope; the Defendant pleaded that they are part, and held of the Manor of Long-hope, which is ancient Demean; and on Iſſue thereon the Book of Doomſday was brought in, by which it appeared that the Manor of Hope is the Land of the of William de Baderon, who held of the King, which, by Twiſden and Keeling, doth not maintain the Iſſue, as 3 H. 6. 8. unleſs the Defendant had pleaded farther, that the Lands are as well known by the name of Hope as Long-hope. Windham conceived the Court ex officio may examine that, and ſo it be the ſame Manor it's well enough; the Trial being by the Court, and the Book good Evidence. Foſter conceived this Book the Trial, as the Certificate of Marriage by the Biſhop, &c. and ſo is 49 Ed. 3. 23. and therefore the Court cannot take notice they are the ſame. Reſpond' ouſter awarded.

More *againſt* Hamond.

(26) Error. WIld aſſigned for Error on Judgment in Palace Court in Trover, That one Tanner ſerved on the Writ of Enquiry on Precept of the Sheriff, whereas only Stannard was Returned by Venire facias; and Stannard ſerved on the Jury in the Iſſue, which being in an Inferiour Court, is not helpt by any Statute of Jeoffails, which the Court agréed. Judgment Reverſt.

In Deviſe, Br. 6. Cooks *againſt* Bellamy.

(27) Deviſe. IN Ejectment by Special Verdict it was found, that Bower, who was Leſſée for 1000 years, deviſeth to A. for life, Remainder to P.M. in tayl, during the reſidue of the years, and dyeth, making A. Executor. P.M. by Indenture leaſeth to D. for 500 years, all the Eſtate he hath in the Land, whoſe Adminiſtrator B. is Leſſor of the Plaintiff; after which the Feme Executrix marrieth unto the Defendant, and then ſhe aſſents to this Legacy, having entred generally before, and then ſhe dyeth, and by Powis this is good by Eſtopel; and the difference is betwixt a Déed Poll and an Indenture, for in that caſe it had bèen void, as 10 Co. 47. Lampets Caſe, and 4 Co. but in this good, eſpecially againſt all but thoſe that have right: And had the Legatée in tayl bèen living,

ving, he could not have entred contrary to his Grant, no more shall his Executor here; and for the Interest, it's such as may be released to him in Reversion or Remainder, or he may barr it by Estople, as 18 Ed. 3. 47. 1 Inst. 47. b. grant of Lands, and after purchasing them, is stronger then this, 10 Co. 50. a. Grants Case, which is but of a bare possibility, and here is a kind of Interest; also no Title is found for the Defendant, but only that he was Administrator of the Executors of P. M. The Court agreed, that if the Devise recite the Estate of the Devisor, and their intent, that then there can be no Estople. Twisden excepted to the Verdict, which found that the Testator gave the Lands in question in Ascrit, by the name of all his Lands in Ascough, which he doubted was ill; contrà of a Feoffment. Windham contrà, that it is well enough.

Adjornatur.

Siderf. 148 pl. 8. The King *against* Wright.

IN an Information of Perjury, Coleman moved for Judgment, the Recital of the Record in the C. B. of the Action, and Issue, &c. where the Precept was quod Ven. fac. hic, is well enough. 2. The Jurata was in Curia Domini Regis, which may be intended as well in C. B. as B. R. And if this be after Verdict, as it may be intended, it's but Jeofail; if not, it's but Miscontinuance, and at worst its but Error of Record in C. B. which ought to have been taken notice of at the Trial. Twisden, The Recital cannot vary from the Record below, whether it be good or bad: But however by Windham and Keeling, the Defendant being convicted, cannot take any advantage of it, no more then the Sheriff on Escape. Judgment pro Rege, Nisi. (28) Perjury.

In Devise, Br. 1. Coleman *against* Pollard.

IN Ejectment by Special Verdict, it was found that A. was seised, and devised to B. his Heir when at fourteen years of Age, for ever, and if he dye before the Age of 21. and without Issue then living, then to C. which Pl. Com. 289. 2 R. 3. 18. is an absolute Fee in B. the devise for ever being void, and the other part but a Limitation, which on the accomplishing of the Age of 21. is gone, and (and shall not be taken for or) and Moor 13. this shall give no Estate to C. by implication, there being an express Limitation before, 2 Cr. 695. and this is but a Contingent at the best, which is destroyed by the Feoffment of B. as Dy. 330. & 354. at 21. years of Age, Soul (29) Devise. Siderf. 148 pl. 9.

againſt Gerrard, or was expounded for and, according to the intent, by Twiſden; but whether it ſhall be ſo expounded here, or for and, he doubted: The Court conceived not, by reaſon of the word then living, &c. Judgment for the Plaintiff, Niſi. That it's an abſolute Fée, and the Contingent deſtroyed.

Siderf. 148. pl. 60. Bulſtrode *againſt* Hall. Ante.

Friday, June 26.

(30) Sewers. IN Evidence to a Jury, it was ſaid by Glyn for the Defendant, and agréed, that to the Low-water Mark, Waſt may be parcel of a Manor, but of common right it is the Kings.

(31) Peace. TWiſden ſecond Judge, gave the Charge to the Grand Jury of Middleſex, *Sedente Curia*, Gentlemen of this County, which hath a greater Priviledge than any other, receiving your Charge immediately from this Court, which is a Pattern to all others, and ſo ſhould you in your vigilancy in the puniſhment of Vices here, being a greater confluence of wicked men than in other places. For particulars, 1. High Treaſon, ſo called, as being againſt the King, and alſo becauſe all the Politick Members are hereby affected, and whoſoever doth compaſs or imagine the Death or Depoſition of the King, either in his Natural or Politick Capacity, which are inſeparably united, and hurt done to one, is ſo to the other, it's Treaſon. And if any go about to raiſe War, under what pretenſe ſoever of Reformation, it's as well Treaſon as Actual War, and the ſupport of the Kings Perſon is the Fundamental Law of the Kingdom. All ſuch as Counterfeit his Seal, or Adulterate his Coyn; or if any indeavour to abſolve any Subject of his Allegiance, which is as Natural as a Son to a Father; or ſuch as ſeek to reconcile them to any Forreign Power. Alſo 2. Petit Treaſon, ſo called, for that it carrieth a Rebellion with it. 3. Of all Felonies, Murders and Manſlaughters, more eſpecially of Duels, now ſo frequent, which, unleſs looked after, will bring us to the ſame danger as in *France*, that we cannot walk late at night. Of all Buggery, Witchcraft, Poyſoning, &c. 4. Of all Robberies, which are now grown into a kind of Corporation; theſe you muſt preſent. In *Alfred*'s time one might have left his Purſe on a Tree, or on the Road, and found it the next day. Alſo Burglaries, which now go in Companies enough to ſurpriſe a little Village: Theſe are Capital Offences, and therefore

fore ſtrictly to be enquired. 5. There are others, that like Gangreens, if in time not prevented, will ſoon overturn the State: This is a Court which is to correct ill Manners, and therefore you that are the Eyes of the Kingdom muſt ſearch and find all Debaucheries, which are now done in the face of the Sun; you may not diſcover what is revealed to you, and what you do is the act of you all, and therefore you may ſafely deal with any Offenders; eſpecially you ſhould look to Stealers of Children, which is not made Felony, in regard none could think men would be ſo vile; as Buggery was not Capital till *H.* 8. his time, for the ſame reaſon theſe Children at beſt live in perpetual Slavery. Alſo of all that Libel againſt any particular perſons: And ſuch as enter with Force, by what Title ſoever; and of all Batteries and Injuries to men: Alſo in Courts of Juſtice, all Corruption, as well in the higheſt as the loweſt Miniſters: And all Extortion in Officers, receiving more then they ought, or before due; or when they ought to have nothing. Of all Perjuries and Subordinations, which are now common: As alſo ſome perſons that will not ſwear at all; on the firſt our Lives and Fortunes depend; you are Inquiſitors to find out theſe Vices, and to preſent them. Of all maintainers and buyers of Titles, and of Forgeries, which thirty years ſince was rare: And of all Frauds and Deceits in Bargaining and Selling with falſe Weights; or ſuch as by Combination endeavour to inhance the price of Victuals, and in particular ſuch Butchers as are common Graſiers, which is a great Oppreſſion, and in all particular perſons whatſoever; alſo all Foreſtallers, which is now common, theſe lye out five or ten miles off the City: Alſo Regrators, buying by Poulterers, as of Carriers, before they unlade to ſell again. Alſo of all common Cheats, and ſuch as live by their Wits. Of all defects in Officers, Conſtables, and how they puniſh Vagabonds, and Watch duly, and enquire after ſuch as lodge Rogues in Barns, and preſent all, that they may be puniſht. Of all Inmates, and Offences in High-ways; and of the number of Horſes in Wagons; of all Incroachments made into the Streets by Shops; after Hoſtlers and Horſmeat: Of all Nuſances and Bridges, and Alehouſes, and Offences there, and whether they be Supernumerous, or in inconvenient places, in which Caſes Licence cannot ſupport them. So of Gaming-houſes, as *Spearings* in *Bell-yard*, near an Inns of Court, whereby the Youth are withdrawn: Of all Taverns, which in *Jones's* time were but two in *Holborn*: Of all Tipling and Diſorders. Alſo of all that uſe any other than the Book of Common Prayer, or refuſe that, or ſpeak ill of it. Of all ſuch as refuſe to come to Church;

Church; the Statute of 12 d. a Sunday would reach Quakers, and all. You must present no man out of Malice, nor spare them for favour.

The King *against* Spearing. Ante.

Saturday, June 27.

(32) Bastard. THe Defendant consented in Court of Record to keep a Bastard-child, if after he neglect, an Attachment lieth. Also by Keeling, if Certiorari go to remove any Record, if no prosecution be, nor the party cannot get it Returned within four Terms, a Procedendo shall be Awarded, and after that no new Certiorari ought to be granted: But if it be, and the Record be returned and filed, no Procedendo can after be Awarded. Adjornatur.

Gwin *against*....

(33) Assumpsit. WIlliams moved to insert particulars for better caution in Indebitatus pro diversis bonis & catallis 8 l. which the Court granted; and had it been pro mercimonijs & merchandisis, it had been good.

The King *against* Costing. Ante.

(34) Bastard. Siderf. 149. pl. 14. THe party being present in Court, Baldwin excepted to an Order of Justices, being not made the next Sessions after that of the Justices on which the party gave Security to obey the Order of the next Sessions: But, per Curiam, the Order of the first Justices is good enough, which Jones for the Defendant agreed: But there being no Appeal by the party, the Sessions on confirming the first Order, cannot order new Security: But by Wild for the King, the first was quasht, and so by 3 Car. cap. 4. the Sessions have the same power that any two Justices out of Sessions. But, by Twisden, hereby they cannot require Security till default be made in performance of their Order; but if they might, they may refer the value of it to the discretion of any other Justices; and the Order may be good, although as to the Security it may be void, those being distinct Clauses; but contrà where in the Body of an Order is to perform several things; yet Slaters Case, 1 Cr. 470. it may be good as to one, and void as to another. Keeling held the Order perfect, and the Ac etiam also, that the reputed Father of the Bastard should put in Security, such

such as, &c. is nugatory. The Court confirmed the Order. Post.

In Denizen, Br. 7. Collingwood *against* Pace. Ante.

IN the Exchequer Chamber, Witherington Serjeant for the Plaintiff, R. Alien had Issue R. N. J. and G. Aliens, R. had Issue daughters Alien, J. was after Naturalized by Parliament, after 7 Jac. G. was naturalized, and had Issue the Lessor of the Plaintiff born in England, the Defendant claimed by Escheat: The only Question is, Whether G. shall be Heir unto J. Earl of Holderness, his elder Brother, which he conceived he should on the Foundations of Natural and Civil Blood, the last being the Line and Support of the former, which Pl. Com. 304. is the Foundation of all Laws; the Brothers may be Auncester to each other, and so as in Colinage 15. & Kell. 59. need not name the Father in a Mortdancestre, 28 H. 6. 34. they shall not joyn Battel: And Stamf. 57. the one shall have Appeal of the Death, as of his Auncester: And although they derive no Blood from each other, yet they are of the same Blood. It's Petit Treason for the Son attainted to kill the Father, 3 H. 6. 55. Denizen, Br. 1. Feme of Alien shall not be endowed; but this is grounded only on our particular Laws: For by the Law of Nations they are in equal Ability to take by discent, as others, Dy. 224. having the same Natural Blood, they shall be sworn in Let, 14 H. 4. 19. 1 Leonard. 47. that a Confirmation to an Alien binds the King, the Alien having a good Estate of Freehold, till Office found. 2. For the Civil Blood, they have the benefit of the same Parent the Parliament; which had it said, That G. should have been Heir to J. S. and J. to G. there had been no question in this Case, and in saying, They shall be as Natural Subjects, it doth tantamount Natural, being to be intended Natura Generis, and as large as if born in England, which, as the Statute of Uses, doth extend as far as if he were a Subject born, as that doth to enable Trespass, as if the party were in possession. So 20 H. 8. cap. 6. of persons deraign'd, that they shall be as able as if never professed, doth enable them to take by discent: And these are not bare terms of Similitude, but of Identity, as Count in Formedon of Discent, ut filio, &c. or the word talia in pleading or office, unless it refer to other things in certain. This Naturalization is the same with that of the Duke of Lynox, and he died without Issue (and his Heir now enjoyeth the Lands) Dy. Grays Case, Act that one shall be Heir to his Father, he shall also be (35) Alien.

Heir

Heir to his Uncle, so large is the Exposition of these Statutes, as 3 H. 6. 55. to make such Natural Blood inheritable, Creando infunditur & infundendo creatur; and the Lord by Escheat hath given his assent inclusively in this Act, without which, Stamf. 95. Alien cannot be made inheritable, Grotius 161. de Jure Belli, cap. 10. As to the impedimentum Paternal, it holds only where the Sons must claim under them; and the personal Blood remains, so that Covenant to stand seised by one to the other, were good; or if one be kill'd, the other shall have Appeal, Dr. & St. 81. So in any Case where the Father need not be mentioned, as here he need not. In the Case of Edwards *against* Rogers, it was adjudged, after long depending, That the Fine of such Father (although he were named in the discent) doth not barr the Son, claiming from his Cosin; that he hath no disability of Blood, but only of Policy, is demonstrated in that his Issue born in England shall inherit, and yet he hath no other Blood then that of his Father; and it's as reasonable that an Alien may have Collateral, as that he may have Lineal Heir. In the Case of Stephenson in the Dutchy Chamber, it was held that 25 Ed. 3. shall be taken distributivè: So that Issue of Polish Feme by English Merchant in Poland, was by all the Justices, as Yelverton Reports, held inheritable.

2. Maynard for the Defendant, John purchases the Lands in Question, and dyed without Issue, the point is only, Three Brothers Aliens, the Eldest hath Issue born in England, the Youngest is naturalized and purchaseth Lands, and then the second is so; then the youngest dyeth, and whither the Brother, or the Son of the Alien shall have the Lands, is the question. He agreed, 1 Inst. 8. in case of Attainder, they may inherit; also that Parliament may enact, that J. S. shall be Heir to the remotest stranger, but this must be by Special words, which are wanting here: For their Naturalizing them doth not ipso facto make them inheritable to each other, more then if they had been Subjects born: For this is the Foundation of all; and the civil Blood is but creatura humana and a superstructure on the former, and so must have some common Fountain, whereby they are enabled to claim by discent, For in Discents, the Law hath regard to some subjectum commune, from which they both derive, they cannot be Brothers, nor derive Jus sanguinis fraterni, without a Common Father. And Cooks Opinion, 1 Inst. 8. is founded on a Collection of almost all the Books, that speak of this Subject; Aliens are not persons disabled, but persons not existing: And this is the reason that the Fathers, being

being Alien, will not hinder the discent to a Son: All that have possibility to inherit each other, are linked by aliquod commune vinculum, which is not ipse sanguinis, but Jus duplicatum thereof. And in the computation here on gift in Frank-Marriage, the Stock must begin at the Father, as to all things else, they shall administer one to another: But in discents, is aliquid sacrum; and to make them capable immediately from each other, is to make a new Ancestor, that as to him, had no right to have such discent made from him. The Objection that the Law regards only the first Purchase, and the last Seisin, is but petitio principij; for it's not sufficient to say quod discendit jus ut Fratri, but ut Fratri & Hæredi; and in the last word lyeth the weight of the pleading, which taketh in as well the Civil, as natural Blood. So in case of Bastardy, the discent ut Fratri & hæredi is not traversable, but the Bastardy must be specially pleaded, as a particular reply to the Hæredi, and because its to draw the Tryal to another Jurisdiction: There are many ways of being Cosens, therefore must every one shew Coment; contrà of Brothers, they can be but one way; but Coment Heir (which may be various) is here shewed. It might be a Quære if the Elder Brother purchase Lands, which by his death discend to the Uncle, and the Father is attainted, and then hath another, whither hereby the Lands shall be revest, is a question. Cooks Opinion may well Ballance the case, 2 Cr. 502. of Dixon, and there had the Father not been Denizen, the Case had been like this, by the Eldest Brothers Fine, in the life-time of his Father, Tenant in Tayl, surviving the Father, the younger Son, Bradstock *against* Scobell, on the Reason of the Statute, that in Formedon he must claim as Heir, is bar'd. The pedegree and degrees of Consanguinity, as they are in fact, are the lines which draw the discent from one to the other, and is the measure of it. 2. All the words of the Act are fulfilled, in supposing the Naturalized to be a Subject born; it differs but as manus expansa & contracta. There are indeed general words, that his Heirs (wheresoever born shall Inherit) which may possibly take in any Alien Heir; but as to the person Naturalized, there is nothing more. Moor. By being made a Corporation to purchase Lands of 100 l. he may purchase Lands of 1000 l. So here, he being denizen for a minute, or to one intent, is so to all. And doubtless, this Act never intended to make new Ancestors, unless he had been named as an Alien, that had Alien Brothers, or Alien Father, but it only takes off his personal disability. I hold, that if one that is no Merchant have Issue beyond

Sea, its Alien, especially if he went contrà Prohib. Regis. Also I affirm, that Feme of an Alien is dowable by 2 H. 5. cap. expresly, sée L. Co. 31. contrà; the Parliament takes notice, that there might be Collateral Heirs in the Motion, so prayed, Judgment for the Defendant. Adjornatur.

Boucher *against* .....

Monday, June 29.

(36) Prohibition. A Prohibition was prayed to the Ecclesiastick Court, Suggesting that he was chosen by the Prebend of S. and his Lessees, and B. claiming by the Dean and Chapter came to the place where the Official used to sit, animo sedendi, and was disturbed in denyal of the Keys, by the Official of the Lessée. The Court conceived this a Temporal Act, punishable by Action upon the Case: But unque accouple, or nient sa Feme, when by such Tryal the party may be lyable to Adultery, is tryable in the Spiritual Court; and the Court denyed a Prohibition.

The King *against* Burges. Ante.

(37) Force. March. 6. pl. 12. Sider. 149. pl. 11. AN Indictment of Forcible Entry removed hither by Certiorari, the Defendant by Protestation denying the Force, for Plea against restitution, alledged the Statute of 31 Eliz. cap. 11. and the party indicted may traverse any Allegation of Seisin for years, or of Estate continuing, 2 Cr. 52. Lodge *against* Fine. Winnington pro Rege excepted, that such person being Lessée for Life, hath not shewed Coment when his Estate began, which is necessary, when the Title depends thereon, for which cause the King demurred: But, by Jones for the Defendant, its needless to set forth any Title, for so any possession, be it by right, or by wrong, have been three years, its sufficient within the Statute; the Court inclined that this is well enough: But by Keeling, its not said that the party Indicted was possessed three years, but that his Mr. J. B. a meer stranger, was possessed, by whose Authority he entred, and although that he may be Servant, or other, acting under the party himself, yet this three years possession is taken strictly. Windham conceived this would let in the same mischief that was intended to be prevented, if such Plea should not be admitted. And by Twisden, for a Forcible Entry by my Servants, there can be no others Indicted but they that were there, and so the chief person concern'd may

may be left out by fraud. Foster agreed the possession of the Servant to be the Masters ; but this Act shall not be expounded in favor of force; also by Keeling, the Statute only secureth forcible detainers by such as have been in possession three years, but not in favor of Forcible Entries. Adjornatur.

Prins Case. Ante.

(38) Mandamus.

POwis excepted to the Return of his Mandamus, 1. Because the Commissioners have no power to Act by the Statute of Corporations, in that it appears not that the Commissions Issued out before the twentieth of February, and the date ought for this cause to have been special, because this Commission is but a bare Authority, as an award by Arbitrators: So Commission that issueth to enquire of what Lands J.S. (Attainted with forfeiture from 1 May) hath must shew the certain day, and so Pl. Com. 479 & 485. Lovells Case whereever any express Commission is given, they must; contrà of an Escheator, or Commission given by Law, that need not be precisely pleaded. Also if the Commission do not thus shew its date, the party is remediless, for here is no false Return, and so no Action upon the Case lyeth: And if it, being defective, be taken for a good Return, the Court cannot Restore him; so if he were turned out the last of February. 2. There is no cause returned why he was turn'd out, which ought to be at Common Law: And so likewise on this Statute the Commissioners being made hereby Judges, which is always ex causis, and cannot be without premises, the Commissioners may hereby remove for other causes then at Common Law, but they must shew some, or else this inconvenience would follow, that the Kings best friends may be turn'd out, and their private friends induced. Also these Commissioners are without Appeal, and therefore it was never the meaning of the Statute that they should turn out without cause. That which is return'd, that the Commissioners judge it not expedient for publick safety that he be continued, therefore they turnd him out, this is but a Judgment on effects without Cause, for they ought to shew, for what cause it was so dangerous: Also it doth not appear that the party was ever summoned, which is necessary by this Statute 11 Co. 98. Bags Case. Else no question can ever arise, for decision whereof, the Statute is made: Also it cannot appear how they are affected, unless they be summoned: This from the preamble. 3. From the Body of the Act, Its against natural Equity to Judge without hearing and Summons: And

hearing the parties, is implyed in the Commission, as the making a Judge, Constituimus te judicem, in which is implyed that they should Judge according to right, which they cannot do without hearing, The Statute 11 H. 7. cap. 3. 4 Inst. 40, 41. 2 Inst. 51. is like this in penning, whereby Emson and Dudly proceeded, without hearing parties; but there is a Remark on it, and such an Arbitrary power would make the Statute void. Every Recorder having a Freehold, cannot by Magna Charta be turned out by any Act of Parliament, without hearing 42 Ed. 3. cap. 3. especially where words are dubious, such exposition shall be made, as may stand with Magna Charta, and the contrary is against Natural Equity, L. 5. Ed. 4. 40 Hub. 87. and like a power given to hang or Execute Men, as they shall think fit, which is but only a greater penalty, and alters not the Sense of the word, or meaning of the Statute. This is like the Statute of Sewers, 6 H. 6. 5. 23 H. 8. 5. wherein they are Authorised more largely then in this case, yet they are bounded by Law and Reason; and 5 Co. 100. 10 Co. 140. they cannot judge, but according to Rule: And the word discretion is more large then the word expedient: and therefore in such case they must Act by Rule, à Fortiori here: Also these are not sworn, as those are: So 12 R. 2. 13. 4 Inst. 41. And the Parliament themselves can judge none, without being heard, as 18 Ed. 3. Mortimers Case, or without Summons; so 18 Ed. 3 Rot. 13. Earl of Arundels Case, both those Judgments being without accusement, or hearing, were reversed; much less can Inferior Courts proceed without hearing or Summons. Jones for the Commissioners agreed, that in pleading Omission of date is fatal, but in Returns, its sufficient that they be substantial, remedy being to be had against them if they make it false. Also they could not do it by vertue of their Commissions, unless they did it in due time. 3. The Act hath reposed a trust in the Commissioners, for breach of which the party is remedyless: Also the Statute is not, that if it shall be expedient, but only if it be so in their Opinion, whether there be cause or not, and for this reason, there is no use of Summons: and here were secrets of State in this Act, and they intended not a Judicatory, as at Common Law. Keeling held this Return good, being by the Mayor, and not by the Commissioners, yet he was one of the persons to whom the Writ is directed, and so well enough. Also Commission may be good enough after the 20th February. Also the causes why no particulars were limited, for which only they might turn out, was because the House was unwilling to Rip up any old sins pardoned by the

the Act of Oblivion; also whatever any Legislative Power say, we must think fit; contrà of a power only Judicial. Windham held the date of the Commissions doth bind their power, being particularly given; but this shall be intended, being said by virtue of the Statute. But 2. He doubted that they ought to return a Summons, or that they Judged it not expedient so to do, and the Act saith nothing to the contrary: as the Act for the Militia, that men shall be fined ad discretionem on default of Arms, shall not be construed good, without Summons of the party: And so in all expositions of Boundless Commissions given by the late Irregular Powers to Justices. Twisden agreed with Windham; Foster with Keeling. The Parliament being sitting, the Court conceived the best way to pray advise of the Lords in Parliament for exposition of the Act, and not to give any Opinion in it during their sitting. Adjornatur.

The King *against* Stafford. Ante.

(39) Sewers.

SMith for the Commissioners of Sewers, that its not material to shew what possession the Defendant hath in the said Oldbury Mills in Comitat' Cloc. this being 12 Ed. 4. present on their view, as the case of Wisbig. 1649. And 2. the Decree may by 23 H. 8. be as well on view, as by inquisition, as 1 H. 4. cap. 12. Also that the Miller, on opening any of these Gates, shall be imprisoned, which is well enough, being a contempt to their Law out of Court, and for which the Commissioners may fine, and consequently imprison for a time certain, but not quousque finem fecit, because the fine is leviable only by Estreats of the Exchequer. 2. Admit this is void, yet the Decree is good for so much as is well awarded, as an Arbitrement of more then in the Submission. 7 Jac. Laurence *against* Car, The Court overruled all the Exceptions, only the Imprisonment, and left them to be tried on Issues: Also that all the rest of the Decree is good, but only that: Also they need not set forth that the Mill was erected since Edward the firsts time. The Court ordered Trial should be of the right, by taking Issue on what they have Returned. Adjornatur.

Pane

Parre *against* Evans. Ante.

(40) Admiral. Glyn insisted upon it, that this bond in certain sum of 1000 l. as Stipulation to pay Condemnation in default of the party, is good, and according to the Constant and auncient course. Powis on search affirm'd, that this course began only in the time of Quéen Eliz. and aunciently they used to take only Stipulation in Sums incertain to sée the Decrées perform'd; and this security by Bond of certain Sum, Noy. 24. Records Case, is the same Recognizances on which all former Prohibitions were grounded. Glyn agréed it would be void, should they procéed to levy the 1000 l. on the Lands, &c. but they never do so, but only proceed in the cause for the Condemnation. But, by Foster, this cannot advantage them more then the aucient Stipulation, unless in that they may procéed on the Bond it self, as at Common Law, which Twisden agréed; so Windham; and that Stipulations were the auncient course; and whither in a Sum certain, or uncertain, is not material, but they might use both. Keeling agreed with Foster, that its needless, and not fit to alter the old way of Stipulation. Adjornatur.

Pope *against* Ramsey.

Tuesday, June 30.

(41) Slander. IN Suit in Spiritual Court by Parson, for calling him Knave, and a noted Knave, and prospered in the World accordingly, and he cared not a Turd for him. It was moved to stay Prohibition, that the Suit was only pro Reformatione Morum, as 1 Cr. 457. Pew *against* Jeoffryes, it was staid quousque, the Court inclining the Suit well lay.

Host *against* Oakeman.

(42) Slander. ACtion upon the Case was brought against Feme (on a question asked her per quendam ignotum) Did J. S. the Plaintiff Ravish you? She answered Yes. Had he the use of your Body? She answered Yes. Whereupon the Plaintiff brought his Action against Baron & Feme. Foster conceived, in regard the person is found to have done it falsò et malitiosè, and without any Legal Authority, it's a Scandal; contrà by Twisden in the Case of Emme, where one that had a Child at Nurse came to a Surgion, under whom she was reported to be in

in Cure for the Pox, who on Enquiry told the Father She had the Foul Diſeaſe, which was held no Scandal, it being not ſpoken malitioſè, or with intent to ſcandalize her; and Bacon directed him to be found Not Guilty. Adjornatur.

Gwin *againſt* Gwin. Ante.

BAldwin for the Plaintiff in the Writ of Error, That the Record is well removed, being betwixt the ſame parties, and of the ſame Lands. And the Preſident in Cr. is verbatim the ſame. But by Williams for the Defendant, the Curſitors affirm their Courſe is always in ſuch Certiorari's to expreſs the particular nature of the Writ, as it's protected to be followed; but the Court conceived it well enough: Whereupon Williams affirming the Judgment below to be right, quod habeat terram et teneat to him and his Heirs, prayed a new Certiorari for this diminution. Keeling, The Courſe is never in ſuch Superiour Courts to alledge diminution in the Judgment, or any Plea-Rolls that remain with the Prothonotary, and are hither tranſlated; but of any other Rolls, as of the Original, &c. they may, which the Court agreed, eſpecially being to reverſe the Judgment; but to affirm the Judgment it may be alledged. But by Windham and Keeling, no diminution can be alledged in the Judgment it ſelf, although it be to ſupport the Judgment; contrà by Twiſden. Alſo this, if it might be alledged on in Nullo eſt Erratum pleaded, is in diſcretion of the Court to grant, or not, and is never granted to Reverſe the Judgment, but ad Informand. conſcientiam Judicis to affirm it, yet when it comes in, it's made uſe of to Reverſe it, as was Reſolved 2 Car. in a famous Caſe. (43) Error.

Judgment Reverſt, Niſi.

Frier *againſt* Hen.

IN Ejectment on Special Verdict, the Caſe was, Sir J. Packington conveyed to Feoffées to the uſe of himſelf for Life, Remainder to Sir A. Aſhly and his Heirs, &c. Leſſor of the Plaintiff, during the Life of Sir John Packington; after he becometh a Delinquent, and is ordered, in ſatisfaction of his Compoſition, to levy Fine to the Corporation of Aylesbury, ten years after which he in Remainder Enters for a Forfeiture, and whether by the Act of Judicial Proceedings, 13 Car. 2. cap. their Nonclaim be ſaved. Winnington for the Plaintiff held it was clearly, the Proviſo extending to all perſons whatſoever, their Heirs and Feoffées and Truſtées, (44) Aſſurances.

parties

parties to the Fine: And on the Forfeiture committed, the Feoffees cannot be said Trustees for him, but for the Remainders. 2. This saving shall be applyed to any Sale made by colour of any Order, &c. of Parliament, or Convention, &c. So that if Tenant in Tayl's Lands were sold for his Loyalty, his Issue shall not be barr'd, no more shall any in Remainder. Jones for the Defendant, 1. These Lands are not sold within the meaning of the Proviso, which was intended to be applyed only to Sales by the Trustees of Parliament, of Lands taken away from such by them, but not to extend to any Case where the party himself had conveyed, although it be conveyed out of a seat of this Order: But the Order doth not mention these Lands in particular, nor any particular Estate or manner of Conveyance, so it cannot be said by colour of that. However here is part of another Consideration then of the Fine remitted, viz. 5 s. mentioned in the Deed to be paid (but not so found) but only the Deed in hæc verba. 2. The parties to the Fine could not in those times avoid it; but the persons in Remainder had remedy then to claim their Estate. As if H. sequestred had been Disseisor, and levied Fine, the Disseisee would not have had any new five years; and the Remainder-Men here have but a Trust to support the others, who may yet Enter after the death of Tenant for Life, so only the Delinquent is at prejudice. 3. The Verdict is insufficient, they finding the Bargain and Sale by Deed Inrolled; and that Fine was after levied, but do not say when; so that if it were after Enrolment, as Hind's Case, the party is in by the Bargain and Sale; contrà if it were before: Yet he agreed, that if the Bargainee of Tenant for Life accept Fine upon Conusans de droit, come ceo, it's a Forfeiture; but not so on Fine sur Conusans de droit tantum: But, per Curiam, this can be intended but one Conveyance. Keeling conceived the Act intended only to remedy such Delinquents as were no parties to Fines, nor had given their Assents thereto, but were Estrangers, and could not make any claim till now: Also these Trustees being made to preserve a Use to the Heirs of Sir J. the Remainder to Sir A. Ashly for Life of Sir J. the Remainder to the Feme of Sir J. for Life, the Remainder to the first Son of Sir J. &c. may not be said his Feoffees; nor yet they are not barr'd by his Fine, even by the Law of those times; which the Court agreed: And by Twisden, those times would as well have compelled the Trustees as the party himself, or else they would not have remitted his Fine. Adjornatur.

Dr.

Dr. Poryes Case. Ante.

THe Court conceived this Perjury in promissory Oath, as well as in Chancery, to be within the general words Perjury, excepted in the Act of Oblivion, for which cause they would not Award Prohibition: For as Brunkers Case, such Perjury was punishable in the Star-Chamber, and so may as well in the Spiritual Court, pro salute Animæ. Post. 547. pl. 51. (45) Perjury.

The King and Hayes *against* the Inhabitants of Woodford, &c. in Essex. Ante.

Wednesday, July 1.

IN Writ on the Statute of W. 2. cap. 46. the Inhabitants of the Wills adjacent being admitted to plead, after Mony levied, &c. Issue is taken that the said Sepes & Fossatas were pull'd down in the night, or at such times when the Plaintiffs could not take notice thereof. The Defendants having pleaded that they pull'd them down in the presence of the Plaintiffs. And in Evidence to the Enquest now, it was observed, 1. That no Evidence can be given after the date of the first Distringas; also (and) in the Statute, or (or) in the Issue, are all of the same sense. Jones for the Defendants conceived, that if they were broken down in the day, it's not within this Law, especially not by reason of the Plaintiffs absence from his dwelling: Also on Issue of pulling down Sepes & Fossatas, Evidence cannot be given that Pales were pulled down: And per Curiam, in this Special Issue the Defendants cannot prove that the Plaintiff is no Lord of the Manor, but that J. S. is Lord, as on Not Guilty pleaded they may. Foster and Twisden directed, that it must be either done in the night, or else secretly, and by such persons that cannot be known in the day: Also this Offence being in Forest, where the Keeper may come always, it had not been within the Statute on Not Guilty pleaded: But on this Special Issue nothing is to be enquired, but whether the parties did it with intention not to be discerned, as sculkingly in the day, and when the Owner might not find them. Keeling agreed that it's not material whether done in the night or day, so the parties be known, or that the Owner have any notice of them. (46) Common.

The King and Primate *against* Fenwicke and Holt. Ante.

(47) Perjury. Siderf. 149 pl. 13.

GLyn moved for a new Trial for Perjury, the Defendant, for whom the first Verdict went, having suborn'd, and by practise laid great Actions, and Arrested the Witnesses that they should not come, which appeared by Affidavits. Windham conceived there ought to be a new Trial, and that fraus neminem patrocinari debet, and is not like the case of Life, but on bare absence of Witness none shall be granted; Keeling contrà, and that the Imprisonments, having been a long time before; viz. 13 May, when the Trial was 15 June, it was cause to stay it, but not to avoid it; but the King ought to inform against such person for Contempt, which is better and less hazardous; And new Trial (unless for misawarding of Venue, which may be done, as Arundel's Case, in case of Life) is without President; so Twisden; but he would have the first Verdict stand from Entring, till the Trial of the practise by Information, especially there being no other ground for it then Affidavits; Foster accordingly: And Windham conceived this way very expedient; the Case of Tourner, nor of the Leather-sellers are no fit Presidents, a new Trial being granted by consent. Post.

The King *against* Costing. Ante.

(48) Bastardy. 1 Cr. 343. & 350.

KEeling on perusal of Pridians Case, Hazelings Case, Hamonds Case, and Smyth's Case, 6 Car. said that on the first Order of Justices for keeping a Bastard, the Security by 18 Eliz. is to abide the Order of the next Sessions, and no other. And if they affirm the first Order on Appeal, or annul it, still the first Security only remains, and no other can be taken of him, or any other person that shall appear to be the reputed Father: And in this Case the Justices of a third Sessions have nothing to do to discharge or affirm the first Order. Twisden conceived the next Sessions to be meant, cum grano salis, viz. the next of that Division where such Offence is in Kent, or Sussex, the Justices of the Western Division never coming to Canterbury, nor contrary, although both be pro Comitat. And this did Lambert, who was a Learned man, and Sir William Eyely, a fearful man, held them; Windham accordingly, as in Wiltshire, his Country, is used; also although the Clause of new Security be void, yet it's good for the rest: So Foster for Sussex, the next must be intended the next Sessions fit for that occasion; and this is the truest sense of the Act

Act of Parliament. And per Curiam, the Order was confirmed præter that Clause of new Security should be quasht, and the first Security stand; but by consent the Order was wholly quasht, and Security put in here to abide the Order of the next Sessions, and to pay the Churchwardens their Charges, the rather for that Keeling insisted, that the Order ought to be at the next Sessions precisely, unless where the Law takes notice of any particular Divisions, as in Yorkshire. Also he conceived, that where any part of the Order goeth to the whole (as here the Imprisonment) the whole Order ought to be quasht: Sed Curia contrà when the Clauses are distinct.

Vangangell *against* Browning. Ante.

(49) If the Defendant be an Alien, on notice given by his Attorney to the Plaintiff, or his Attorney, the Plaintiff ought to Enter it on the Roll, to have Trial de medietate at his peril; but the Court refused to Award it for the Defendant, on his Affidavit that he is an Alien.

Alien. Alien shall not have a *Tales de medietate*, unless the first *Ven. fa.* were so. 3 Ed. 4. 11. b. pl. 3.

Shirly *against* Dobson.

(50) Nota pro Regula ex motione Stroud Jun. That Venue on Declaration delivered before Essoin day may be changed that Term any time; but if Declaration be delivered before, &c. as of the last Term, or within the last Term any time after the Essoin day, the Defendant may change it any time in eight days within the Term following, but not after, but by the Act of God.

Visne.

Dr. Porie *against* Everard. Ante 545. pl. 45.

Thursday, June 2.

(51) Will moved against a Prohibition, which was granted, quoad a Table of Fees taken out of the Church by the Churchwardens in 1640. being pardoned by the Act of Oblivion, affirming the Act was never pleaded there; and besides, this is a kind of Sacrilege excepted in the Act. Jones for the Plaintiff granted it, had the Controversie been for the Table it self, but this is for a fraudulent altering the Fees. Also it appears by the Libel it self, that the first Judge disallowed the Act, but he confest that on Appeal they had not offered it de novo; but the Dr. ought to take Issue on, or demur to the Suggestion, which Twisden agreed in omnibus;

Fees.

and that the property remains in the Parish, as of Communion Plate, and recoverable at Common Law with damages; so Foster. Windham agreed that it's suable for at Common Law; but yet it's Sacriledge to take away any thing hung up in the Church, and the Spiritual Court may punish it now pro reformatione Morum, which Twisden agreed as a Crime, but here the Original is pardoned, and so the Continuance of it. Windham contrà, That it's not pardoned, being Utensils; and if it were, yet the Continuance is a new Crime, punishable pro Reformatione. Keeling conceived, That wherever Offence is punishable at Common Law, as Debt for subtraction of Tythes, it's not to be punisht also in Spiritual Court pro reformatione Morum; Curia contrà, as for beating a Clerk, Suit may be in both places. Wild offered now to accept the Plea, but the former Judge having refused it, Jones conceived that they could not now accept it: The Court directed them to take Issue, or demur on the Suggestion.

Siderf. 150. pl. 15. The King *against* Ward. Ante.

(52) Coron

By Inquisition it was found, That one Reynolds was possest of a Term now in possession of the Defendant, and that in 1648. he became Felo de se, and that after the King pardoned all Felonies, 12 Car. by Act of Oblivion, excepting Murders; and whether the Goods of Felo de se, whereof no Inquisition was taken before the Act, were pardoned, is the question. Keeling conceived that the party was not capable of a pardon, and so could not be within the Exception, the intent of the Act being only such Murders that were punishable as examples; but this is within the words of the pardon, quoad the Goods, there being no Inquisition; but if there had, they could not be discharged (being actually vested in the Crown) without a special Restitution. Windham agreed it's Murder, and more then Murder, yet so is Petit Treason, which Dy. is not excepted by such words, having a peculiar Notion and Nature, and of another Appellation; so hath Felo de se; Twisden agreed. Foster contrà, that it is excepted, and it's by his own act that he is become incapable of pardon; and the end of Law is, that pœna ad paucos metus ad omnes perveneriit, which cannot be satisfied without this punishment; and the King is intitled by the death of the party, and that after office is but for Instruction. Mallet, when here, did accord with Foster: But now, Keeling being of another Opinion, Judgment for the Defendant, Nisi.

Wheatly

Wheatly *against* Thomas. Ante.

IN Ejectment of the Manor of Cooling on Special Ver- (53)
dict, Glyn for the Plaintiff, G. Lord C. and Tho. his Bro- Patents.
ther. G. had Issue eight Sons and two Daughters, and G. Lord C. devised to Sir William B. his eldest Son for Life, Remainder to his first Son, &c. in default of such Issue to G. his second Son, and so to all, and after to the Daughters for their Lives; and after to the first Son, &c. In default of such Issue, to the Heirs of the Body of Tho. his Brother; In default of such Issue, to the general Heirs of the Body of the first, and so of the eight Sons, the Remainder in Fee to Edward the youngest Son. G. Lord C. dieth, then William Lord C. the eldest Son, who had Issue H. and G. and four Daughters; then he died, and the Lands descended to H. and the Uncle, and the Brother Edward being dead, he had three Estates in him in Special and General Tayl, and in Fee: Then H. and G. are Attainted of Treason, and all these Estates are forfeited; then all the Brothers dye without Issue, and the Daughter of William, who was the Son of G. being Heir to all the Estates, is Lessor of the Plaintiff, after the Attainder of H. now Lord C. and G. was found by 3 Jac. and G. was Executed, and hereby they were to forfeit all, and that the King shall be in possession without Office, with Proviso to save Leases made by the King since the Attainder: Also there is a Proviso of the Lands in question, saving them to Duke Brooke and his Heirs Males; and for want of such Issue, to the Heirs of the Body of William. Adjornatur.

Baker *against* Westcom.

STroud moved for Costs for the Plaintiff on the Statute (54)
of 18 Eliz. 2. of Maintenance, which giveth them gene- Maintenance.
rally. And 4 Jac. giveth it for the Defendant: This Action In Costs, Br. 23.
is Tam quam, but it only demands Damages to the party, not any Moiety: Whereupon the Court gave Damages for all.

Collins's Case.

RAymond moved for a Mandamus to Restore an Attorney (55)
within the Liberty of St. Martyns le Grand, to be di- Mandamus.
rected to the Steward there, Et ei conceditur per Curiam.

Wood

Wood *against* Tourner.

(56) Records.

PEr Curiam, the course of the Court is, That whenever the Plaintiffs Attorney hath notice to bring in the Postea, if he putteth it not in till the last day of the Term (as here) the Defendant shall have four days to move in Arrest the next Term, and Judgment shall stay, without shewing any cause; and being Signed immediately after the Term, it was vacat.

Hodges *against* Holdi. Ante,

Friday, July 3.

(57) Ancient Demean.

IN Trespass in A. the Defendant pleads that A. is parcel of the Manor of Long-hope, which is Ancient Demean, and prayeth it may be tried by Doomsday Book, which was granted: And now in that Book it appears the Manor was Hope only, which being Trial by Record, as 9 Co. Strata Marcella's Case, it's a failure; Pl. Com. 18. as any variance in person or time is also. By Symson for the Plaintiff, They might have pleaded Conus by one Name and the other, as 22 Ass. 45. which would be triable per Pais, but now it is not examinable, whether they be the same or not; which Twisden agreed; but Windham doubted it may, it not being necessary that the Names in the Book, and as pleaded, should exactly accord; but if there be any Similitude it's sufficient, the Book being but an Evidence of it, as Inspection of Infancy, which may be supported by Witnesses and Examination. Keeling and Foster accorded with Twisden; and that this Trial is not like the Case of Inspection, which is solely in the Breast of the Court; but this is precisely to be tried by the Book, and the Court are not Judges. Respond' ouster Award.

The King *against* Fountayn.

(58) Trade. Siderf. 152. pl. 22

POwis moved to quash an Information in the Quarter Sessions of Abbington, for using the Trade of a Grocer, contrà to 5 Eliz. which the Court would not allow, this being suit by Common Informer, which is to Recover costs, and is interested in the Suit: And the course of the Court is, that he cannot quash it, as they may an Indictment or Information at Suit of Sir Thomas Fanshaw Clerk of the Crown, but they directed him to demur, or take Issue on the Declaration.

Dr.

Dr. Patrick *againſt* Queens Colledge. Ante.

ON Mandamus to the Senior Fellow of Queens Colledge, to ſwear and admit him, being duly choſen Head, Maſters excepted to the Return, as omitting all the Statutes for Election. 2. Its not ſaid, that the Vice-Chancellor was pro ea parte appointed in the abſence of the Chancellor, as is requiſite by the Statutes of the Colledge. 3. There is no cauſe ſhewed, why he ſhould not admit him: And as to the Matter, this is of a Maſterſhip, Dr. Witherings-tons Caſe, but a Fellow of a Colledge. Alſo in Dr. W. Caſe the Court held the return, being particular, good; but the Court did not do it for want of Jurisdiction: But in this caſe there is no ſpecial Return, nor any Viſitors, but of private appointment; whereas in Dr. Witheringtons Caſe, there were Viſitors confirmed by Act of Parliament. Alſo here is no Controverſie in the Election in the Caſe at Bar, and ſo no need of ſuit to the Viſitor. Adjornatur. (59) Mandamus.

Ward *againſt* Hauchet. In Elegit, Br. 5.

MAynard prayed that the Plaintiff might file a Fieri Facias, part of the debt being levied thereby on Judgment (to the intent to have an Audita Querela on Elegit executed after it) which he alledged they ought to do, had the Sheriff only taken Bond (by aſſent of parties) for payment of the Money; and the taking ſuch Bond was adjudged in a Weſtern cauſe at Exeter, to be pleadable in Bar of new Execution, which the Court agreed; yet held that if no Execution be done, they cannot compel him to return it: And here the Sheriff had only ſeiſed, and then the parties compounded, and the Goods were delivered to the Defendants, and therefore they would not compel him to Return the Writ, but in ſtrictneſs they ought to force it. But by Twiſden, an Action upon the caſe lieth againſt the Sheriff, if H. be endammaged by the not Returning it. 2. He excepted againſt the Elegit, which was quouſque Reſiduum debiti (nothing having been ſpecified before levied) be ſatisfied, which per Curiam is well enough. Adjornatur. (60) Execution.

Foſter

Foſter *againſt* Norclif. Ante.

(61) Baron & Feme. IN Ejectment, the Sollicitor prayed imparlance till next Term, that in that time they may cauſe a divorce Cauſa præcontractus, which precontract alone he conceived would not avail them at the Trial, and ſo the Court held as 11 H. 4. 14. pl. 30. by Rolf. And alſo that as this caſe is, they cannot ſtay it, no queſtion ariſing on the Loyalty of the Marriage, but on the fact: But for the difficulty, they Awarded a Trial at Bar.

Pane *againſt* Evans. Ante.

(62) Admiral. GLyn attended the Court with Preſidents in the Admiralty of ſuch Bonds of Stipulation in Sum certain, and Tr. 13. Car. Burroughs *againſt* Blofield, this point was adjudged that no Prohibition ſhould go, but the Court remembred not the caſe. In 21 H. 8. there (as all downard had been) was Fide-Juſſerunt in 400 mark de Judicio Siſti & Judicato Solvendi the Condemnation, which being but pro forma, and the proceedings only like Scire facias againſt the parties, is not like Recognizance or Bond, but as Stipulation made in any Court whatſoever, whither of Record or not. And had it been Bond or Recogn. the Court would have awarded a Prohibition, but as this caſe is, per Curiam, ſhould we grant Prohibition, we ſhould overthrow the whole Court.

Taylor *againſt* Hardy. Siderf. 150. pl. 16.

(63) Treſpaſs. IN Treſpaſs pedibus ambulando, Stroud aſſigned for Error, that in the Court (ad valentiam was omitted) but it was in the Writ, which by Twiſden is well enough; Windham doubted, this being on Judgment by default: But 2 Cr. 654. Bradford *againſt* Ramſey, it had been well enough; ſo valentiam for pretium, as 2 Cr. 147. Bagſhaw *againſt* Gower. Adjornatur.

Duncombe

Duncombe *against* Dale.

IN Ejectment, the Defendant Suggested on the Roll, the Plaintiff is Lessée of Dean and Chapter, within whose Distress the Sheriff, to whom the Venire facias should be awarded, is, and therefore they prayed Elisors, which was awarded, and Judgment given accordingly in County Palatine of Durham: And now it was assigned for Error, that this is no principal Challenge, and so the Venire facias ill awarded, as 9 H. 7. 22. but by Jones 2 Cr. 547. pl. 6. after an Award made as here, its no Principal Challenge, notwithstanding it went to Elisors by consent. And, per Curiam, had the Title of Lessor of Plaintiff been awarded dehors, it had been no Principal Challenge; contrà here, where it is induced with the Plea it self on the Roll. Judgment Affirmed, Nisi. (64) In Challenge Br. 159.

Palmer *against* Flessier.

IN Action upon the Case for stopping Lights by the Lessor, who built the House with Windows, and sold it to the Plaintiff, and after sold his Lands adjacent to the Defendant, who built on his own ground adjacent, and stopt the Lights; which, by Jones, for the Plaintiff, he cannot, which Twisden agreed: But otherways of a House built near the Land of a stranger; so Foster, all claiming under the Lessor or Grantor, are as well concluded, as he himself, especially for such necessaries as Light and Air, &c. Clerk *against* Cogg, 1 Cr. 170. On selling two Closes, and keeping the middle, I shall have a way against my own Grant, although I may by another as convenient: And so he held the Defendant could not stop up the Lights. So when a way is necessary, unity doth not extinct it, as Sury *against* Piggot, 1 Crook contrà where its only convenient: And, by Keeling, here the Lights are no more. Adjornatur. (65) Nusance.

In Debt Fitzh. 80. Brumfield *against* Penhay.

(66) Sheriffs. IN Debt brought by the Sheriff on Bond for appearance; the Defendant pleaded there was no Writ ever delivered to the Sheriff, and so would avoid it by 23 H. 6. Jones for the Defendant agreed the Case so to be, that the Sheriff after Writ sent out, but before delivery, takes security, which per Curiam, he may, if the Defendant will give it. Judgment for the Plaintiff, Nisi.

Gardener *against* Morefield.

Saturday, July 4.

(67) Usury. PEmberton assigned Error in Action tam quam on the Statute of usury, that it was brought in the Court of Ely, which lieth not there, as Gregories Case; and Barrington *against* Kine, 1 Cr. but only in the Courts of Westm. Adjornatur.

Lister *against* Coplie.

(68) Error. ERror of a Judgment in the Court of Doncaster in Action upon the Case, for that no Return appears of the Venire facias, which per Curiam, there being no Pannel annexed, its not aided by 21 Jac. although there was an Hab. Corpora; for it cannot appear by Examination, without a Panel, that the Jurors were the same as were sworn: Also Pannels are never annexed in Inferior Courts, nor was the Statute ever intended to help them. 2. It was on a promise, and the Count was quod super se assumpsit (but said not & fideliter promisit) yet it is after said quod promissionem & assumptionem non curans, Sed fraudulenter intendens ipsos decipere, &c. non solvit, &c. Adjornatur.

Southcot *against* Newland.

(69) Error. ERror of a Judgment in Doncaster, for that the Venire facias twelve, was per quos Rei veritas Melius sciri (for scire) posset, the which, per Curiam, is Error, as was on long debate resolved here betwixt Ludlow *against* Edgware. Judgment Reverst.

Drake

Drake *against* Bear. Ante.

Mich. 14 Car. 2. Rot. 801.

IN Action of Debt for Rent on Lease made infrà Juriſd. Curiæ of Lands in T. in the ſame County, (not ſaying within the Juriſdiction) which on nil debet pleaded, was aſſigned for Error, in that Eviction or Suſpenſion may be given in Evidence; but Mich. 22. Car. Linſey *againſt*..... Rot. 372. Paſch. is contrà by Polyxphen for the Plaintiff, in ſuch an action in Norwich Court, the Court held it ill, in regard the matter alledged is Traverſable, and not only enquirable, in which caſe it would not be material, as Maſters *againſt* Hudſon on any conſideration executed, as that at H. the Defendant had promiſed on lending him his Horſe, to ride from H. to London, he would redeliver him at H. and on Error Judgment was affirmed in the Court of H. for that the riding was not inquirable: But whatever is traverſable there, is not triable on the General Iſſue, if it appear on the Declaration, although it be not actually Traverſed; and ſo is Ivie *againſt* Stone H. 14 Car. 1. Rot. 844. 1 Cr. alſo on a Bond ſued at Hull, a County of it ſelf, which was dated at Halifax, the Judgment was held void in Debt, on eſcape againſt the Sheriff; and although, as Tr. 14 Car. 1. Rot. 1590. Barnard *againſt* Richardſon, the Sheriff can have no advantage of Error, yet he was allowed to ſhew this, being coram non judice; and by the whole Court, Judgment Reverſt. (70) Lieu.

Hook *againſt* Swain. Ante.

IN conſideration of Marriage with the Defendants Daughter, and of natural Affection, the Defendant covenanted to pay to the Daughter, or to the Plaintiff her Husband 20 l. by the year, which, per Curiam, ſhall be taken more ſtrongly according to intent, then a grant like a Will, and therefore ſhall be for life, as 8 Co. Sir Richard Pexhalls Caſe; and whichſoever of them that ſurvive, ſhall have it, it being apparent on the Record, that it was for their maintenance; and this is the meaning of parties, as Pooly *againſt* Tracy, condition to pay when the Plaintiff ſhould devenire & Obligari, and Breach was aſſigned, that the Plaintiff did not devenire & Obligari per ſcriptum, & per Curiam it was well enough. Judgment for the Plaintiff, per Curiam. (71) Rents.

In Debt, Br. 49. Glascocke *against* Morgan. Ante.

(72) Execution. KEeling conceived that after this Elegit no new Action of Debt can be had, because this cannot be said a Fieri facias, in that in the Elegit the Goods are to be delivered to the party per rationabile pretium; but in Fieri facias the Sheriff cannot do so, but ought to sell them, and the party ought to pursue that way he hath begun, although only part of the Goods had been taken, 17 Ed. 4. 4. 2 Cr. 338. Crawlyes Case, and 1 Leonard. 176. Knowl *against* Palmer, are all contrary by Twisden, that the party, after Nichil retorno on Elegit, may resort (which Keeling agreed) to a new Execution. Windham conceived this is pleadable in barr (that the Elegit was taken out) in any new Action of Debt, 2 Inst. 395. Sed Foster absente, Adjornatur.

Collet *against* Young.

Monday, July 6.

(73) Audita Quer. NOta per Curiam, contrà Twisden, That on Judgment in Aud. Quer. for the Defendant, he hath Election to take out Execution on either the first or the last Judgment.

In Cond. Br. 251. Wade *against* Drake.

(74) Assumpsit. IN Action upon the Case on promise, that the Plaintiff could prove a promise made to him by the Defendants Father, that then the Defendant would pay, &c. It was moved in Arrest by Jones, upon Gold and Deaths Case, Hub. 92. & 2 Cr. 381. 10 Ed. 4. 11. that proof here shall be by a Trial precedent, because the Plaintiff in Action against the Father might have proved it: The Court agreed that this proof must be by Jury; but they also conceived, as in Travis *against* Meers, that the proof may be in the same Action, and the Consideration precedent is sufficient that the Plaintiff is put to labour to seek out proof presently, although it be not done till the Action be brought; and the Plaintiff having averred that he was always ready to prove, it's sufficient. Judgment for the Plaintiff after Verdict.

Gwin

Gwin *against* Gwin. Ante.

THe granting Certiorari on Diminution alledged, after in nullo eſt Erratum pleaded, or Special Errors aſſigned, being only ad informandum Conſcientiam Judicis, is in diſcretion of the Court, and not ex debito Juſtitiæ, and therefore Diminution being alledged in the point of the Judgment that was alledged for Error, the Court conceived it but for delay to grant it, the Judgment it ſelf, and not only tenorem Recordi being removed hither. Williams ſeeing the Opinion of the Court againſt him, prayed an Amendment here, in regard the Verdict is right, quod recuperet Seſinam, and ſo is the Docket in the Great Seſſions, and only the Entry on the Roll is miſtaken, wherefore, as in the Common Pleas, he conceived it might be, as Smith *againſt* Smith, 1 Cr. 410. pl. 486. quiet Poſſeſſion having gone along with the Judgment; the Court agreed, that if ſuch Suggeſtion be true, they may amend as in C. B. But it appearing by the Prothonotary that the Docket was taken by the Judgment, and after it, and not the Judgment entred by that, or any Copy Book certainly kept for that purpoſe, the Court would not amend it: but becauſe it was ſuggeſted that the Record was right, the Court granted new Certiorari to remove the Record, as it was when Error was brought. Poſt. (75)

Siderf. 152. The Lord of Rutland *againſt* Greene.

MAynard prayed a Prohibition to the Defendant the Parſon of D. as Lyford's Caſe, 11 Co. 49. a. b. on Suggeſtion of a Mine digged by the Parſon in his Glebe: The Court conceived that he may well enough do it as Eveſque: But for any Waſte in cutting of Trees, &c. they would grant a Prohibition, but that muſt be ſuch as may be to the deſtruction of the Church; but this is no depopulation: Nor can the Parſon be deprived for opening this Mine, as he may for other Waſte in cutting Trees. Twiſden conceived the Lord may open a Mine in Copyhold of Inheritance. Foſter held it a Treſpaſs. Keeling conceived he could not do it. Maynard conceived there is no other mean for the Patron to try his Right, wherefore the Court gave Rule to ſhew to the contrary. (76) Incumbent.

Collins

Collins *against* Man.

(77) Slander. PEr Curiam on Affidavit of the Lye given by any man to another in the Hall, they will bind him to his good Behaviour: So for any Provocation which may induce any Quarels or Striking.

Siderf. 151. pl. 21. Hursts Case. Ante.

(78) Attorney. NOw the Court were of an Opinion, That a Mandamus lyeth to restore an Attorney in the Court of Canterbury, or any other Inferiour Court, but not of the C. B.

Hardie *against* Taylor. Ante.

(79) Count. THe Court, Foster absente, conceived the Warrant of ad valentiam in the Count, as pretij, &c. is Error, the Judgment being by default; contrà had there been a Verdict. Adjornatur.

The King *against* Harlow. Ante.

(80) Trades. CRooke moved to quash an Indictment on 5 Eliz. for using the Trade of a Hosier, in which he had not been educated, according to the form of the Statute (not saying ut Apprentitius.) 2. It was said he had not been educated in that Art of Hosier, not saying, Nor in any other; both good Exceptions. Per Curiam quasht.

Tuesday, July 7.

(81) Certiorari. PRoctor moved for aliàs Procedendo to Snape Steward of the Court of St. Catherines, there being a new Habeas Corpus (after Procedendo Awarded) brought, he refused to proceed till the Opinion of the Court were known, which was now declared to be, That on Procedendo to any Court where the Steward is above three years standing Barrester, he may proceed notwithstanding any new Habeas Corpus, else not: But he ought to Return, that he is so on the second Habeas Corpus.

The

The King *against* Greene.

JOnes assigned Error of Judgment on Indictment taken by Justices of Peace for words spoken of another, the Justices of Peace having no power so to do, as Justices of Assize may. Foster held it good, as well as they may bind him to good Behaviour. 2. He assigned that the Judgment was Capiatur, and no Fine asset: But per Curiam, the Fine is usually set afterwards. (82) Slander.

DE

DE TERMINO Michaelis,

15 *Car.* II. *B. R.* Die Veneris, Octob. 23. Anno 1663.

{Twisden, Windham, Keeling.

Chamberlain *against* Stacy.

Friday, Oct. 23.

BArwell moved to set aside a Judgment on Suggestion that it was satisfied, which the Court refused without Aud. Quer. but on sight of the Warrant of Attorney, which was delivered up, and Suggestion that the Judgment was entred afterwards, they referred it to the Secondary, as an undue proceeding without Audita Querela. (1) Judgment.

Mourch *against* Laund.

JOnes moved for a new Trial on Suggestion that the Plaintiff, after notice of Trial by Nisi prius, and a Copy of the Jury given to the Defendant, at the day of Trial changed the Jury, which, by Twisden, is well enough, as hath been resolved in an Essex Cause by great advise, in regard that until the Venire facias be filed, the party may continually resort to the Sheriff to see who are the Jurors, notwithstanding it be re- (2) Trials.

tozned, ſince which it's uſed to file the Venire facias preſently, which Keeling agreed: But by Windham it's not reaſonable the Jury ſhould be changed without motion, although no Trial be had, nor the Venire facias filed. Adjornatur.

(3) Admiral. Wild moved for a Prohibition to the Admiralty, on Suggeſtion of an Order there made to render Ship, or abide the Order of the Court, which being on the parties Appearance and Confeſſion of the matter of the Suit is all the proceeding there without any Libel, which Keeling granted, this being no bare Stipulation for Appearance, but a full Decree, which cannot be without Libel: But Twiſden and Windham doubted, & Adjornatur.

(4) Judges. Foſter Chief Juſtice being dead this Vacation, Hyde ſecond Juſtice of the C.B. was called into his place, to whom, ſtanding at the Bar, the Chancellor Hyde ſaid, It's a ſign the Troubles have been long, that there are ſo few Judges left, only your ſelf: And after ſo long ſuffering of the Law and Lawyers, the King thought fit to call men of the beſt Reputation and Learning to renew the Reverence due and uſed to the Law and Lawyers: And the King, as ſoon as the late Chief Juſtice was dead, full of days and of Reputation, did reſolve on you as the ancienteſt Judge left: and your Education in this Court gives you advantage here above others, as you are the Son of an eminent Lawyer, as any in his days, that got as much, whoſe felicity was to ſee Twelve Sons, and you, one of the youngeſt, a Serjeant, and who left you enough, able to live without the help of an Elder Brother. He gave you all the Aſſiſtance, being in his Chamber, and lived in time of Learned men: And for your Integrity to the Crown, you come here to ſit among ſuch perſons as you deſire; and the King and the Kingdom do expect great Reformation by your Activity and the Severity of this Court, that vitious perſons may find your Juſtice. For this Reaſon the King, when I told him Chief Juſtice *Foſter* was dead, made choice of you. Courage in a Judge is as neceſſary as in a General; therefore you muſt not want this to puniſh ſturdy Offenders, eſpecially Robbers and Burglers; for which remember your Uncles dexterity. 2. The Genteel wickedneſs of Duelling, which I beſeech you inquire into, and the provocations and grounds of them; the carriers of Challenges and Fighters, however they eſcape death, the fining and impriſoning them will make them more dread this Court then they did the Day of Judgment. 3. I adviſe you to Patience; angry Judges, like Generals, ſeldom give good Orders

Orders whilſt angry: You muſt mind your Profeſſion; your Eminence, in which hath brought you hither, and the Profeſſors thereof, to keep up Learning, and take care there be no Conſpiracies within doors; Two Inns of Court having omitted Reading this Vacation, which you muſt take care to reform. Thanks be to God we have avoided Conſpiracies openly made.

Hyde Chief Juſtice anſwered, I had ever thought of the Adviſe of the Wiſe Man, Not to ſeek to be a Judge, nor ask to ſit in the Seat of Honour; being conſcious of my own Defects and ſmall Learning, which hath been leſſened by Plunders in the late times, and my Conſtitution *ex traduce*, I admire his Majeſties Grace to advance me to a Judge, which had been ſufficient; but I ſhall, ſeeing his Majeſties further Grace, humbly ſubmit and ſerve him with my Life with all Alacrity and Duty: and deſire his Protection no longer. Your Favor makes me hope not to ſink under this Burden; as alſo the Learning and Experience of the Aſſiſtants I am to meet with; I had rather Endeavour to ſhew my duty in practice, than in anſwer to particulars. Sins of Infirmity, I hope his Majeſty will pardon; and for wilful corrupt dealings, I ſhall not ask it: I attended *Cooks* time as a Reporter here, and after attended the Bar, till call'd away: And as he ſaid, when he was made Chief Juſtice, I ſay now, I will behave my ſelf with all Diligence and Honeſty.

Saunders *againſt* Leeke.

ERror of a Judgment in the Marſhalſey, the Venire facias being probos & legales (not ſaying, as Regiſter 7. liberos homines, &c.) de viſineto; Sed non allocatur. But Judgment Affirmed. (5) Error.

The King *againſt* Challanor. Siderf. 156. pl. 7.

WAllop excepted to Conviction of Forcible Entry by Juſtices on the View, that it wanted addition: Sed non allocatur, for this is not Traverſable no more then Reſcous, although H. may be utlawed on it. 2. There is no Fine aſſeſſed, which by Windham and Keeling is not neceſſary, where the Fine is part of the puniſhment; contrà where the Impriſonment is only a penalty ſet, as Judgment of the Fine for offence. 3. No Bail is allowable till the exceptions ru- (6) Force.

led, this being a Judgment, and the Defendant brought on Habeas Corpus, must on filing, be in Custodia.

Adjornatur.

Osborn *against* Parker.

Saturday, Oct. 24.

(7) Trespass. IN Action of Assault and Battery, the Defendant pleads ex insultu Querentis. The Plaintiff Replies, the City of London is an auncient City, and have pleas, and that there was a Plaint in such a Court before Fr. Meynell, by virtue of which process, the Plaintiff was taken: The Defendant joyns Issue, non cepit virtute Querelæ prædict. And after Verdict, Baldwin in Arrest of Judgment, excepted to the Replication, that the prescription was for Court, time out of mind used, and that according to the custom at a Court held before Fr. M. J. S. entred a Plaint, &c. which should have alledged the custom to hold a Court before the Sheriffs, and that Fr. M. was then Sheriff, &c. but, per Curiam, its well enough in pleading either way. 2. Its said Coram Fr. M. uno vicecomitum, which is well enough, there being two Courts, although they are but one Sheriff: Also the Writ is Vicecomitibus Lond. but Vicecomiti Middlesex.

Hardy *against* Taylor. Ante.

(8) Trespass. ERror of a Judgment in C. B. in Action of Trespass, one of pedibus ambulando, another for spoiling grass, another for driving Cattle, and several Damages; and in the first, Trespass ad valentiam was in the Writ, but not in the Count, which by Coleman is well enough, after Judgment by default: Its so resolved after a Verdict in 2 Cr. 147. and so on demurrer; for its aided by the Statute of Ieoffailes, as 2 Cr. 653. Bradford. 2. There are four several Trespasses, 3 for breaking Closes, and spoiling grass in several Closes, and Chacing his Cattle ad tunc & ibidem unto a Pound, and there detaining them, and the Judgment is de Transg. in Clausis prædict. and nothing of the driving and impounding, which, by Coleman, is well enough, several Damages being severally assessed: But, by Keeling, this Trespass is particular, and its said that the Cattle were impounded ad tunc & ibidem, which shall be intended out of the Closes, and therefore the Judgment being the Warrant for the enquiry, this enquiry is without Warrant. Twisden conceived both exceptions fatal,

tal, in that formal departure from Auncient presidents alone is not aided, and the impounding ad tunc & ibidem must be intended in the Bill, not in the Close: But, by Windham, the ad valentiam omitted is aided, and the Chacing and Impounding per quod his Cattle were impaired, is but a consequence of the former Trespass, which are alledged in the Closes. But Hyde Chief Justice conceived the latter a distinct Trespass, not aided. 3. The Count is ad 40 solid. which being intended solidos, is well enough; which the Court agreed. Sed Adjornatur.

Knight and Kitching *against* Bunkly.

Hill. 15 Car. 2. Rot. 1258.

IN Action of Covenant, Baldwin moved in Arrest of Judgment, it being that Lessée, his Executors and Assigns, shall repair, and for breach, the Plaintiffs being Tenant in Common, by Recovery suffered of Reversion, one Moiety to one, another to the other, bring this Action against the Assignée of Lessée, and this being in the Realty, they cannot joyn, as was resolved in the case of Baker and Berisford, in an Action of Covenant for Rent, it was ruled in Mich. 57 Rot. 1902. that the Action by one for the Moiety was good: And though they may joyn, where both are privy to the contract, yet the assignée of one and the other, cannot joyn; Sed curia contrà; Hull *against* Arnald, adjudged they should joyn in Covenant for Arrears of Rent; so of Aunt and Niece, although it were much doubted, whither the Arrears should go to the Issue of parcener: and the Case of Baker *against* Berisford was grounded on the custom, and not like to this case, which is only in the personalty. Keeling doubted, the personal contract being determined, that they cannot joyn in Covenant, being collateral, and goeth with the interest, and not like Littletons Case of Covenant on Lease made by Tenants in Common: But by Windham, for wast, if Tenants in Common assign to any one man, he may have one Action for several wasts. Adjornatur.

(?) Covenant. Sidert. 157. pl. 8.

Lee

Lee *against* Rayns.

(10) Executors.

POwis moved in Arrest of Judgment in Action upon the Case by Executors on promise, for Wares sold by the Testator; the Defendant pleads the Statute of Limitation, and that the promise was not within six years before the Action: The Plaintiff replieth that the promise or cause of Action was within six years before Mich. 14. Car. when the Action was brought, which is a departure; the Plaintiff having in his Count alledged the cause of Action in 1650. thirteen years before, so 1 Cr. 228. Tyler *against* Wall, but the Defendant doth not demur, but traverseth, that the cause of Action did not arise within six years before, which is found for the Plaintiff. Windham doubted the case in 1 Cr. 228. and thought the time not material, but that the Plaintiff may alledge it well enough in his Replication. Keeling, This doth not answer the first time alledged, and the Issue doth not help against an Act of Parliament; Sed curia contrà: And there being a Verdict, the Omission of the former time cannot come before us, it being not material at Common Law; and to plead Non assumpsit infrà sex annos, is a kind of pleading the Statute, and devised for ease of the people, that they should not plead at large: And the party hath passed by his advantage of the departure: Judgment for the Plaintiff, Nisi. And by Hyde, the Statute is no Bar alone, but is made so by Plea; for alledging fact done forty years since, will not abate the Action, unless the Defendant plead Non assumpsit infrà sex annos.

(11) Fees. March. 89. pl. 143.

WInnington moved for stay of Return of Habeas Corpus, directed to the Mayor of Hull, because the party would pay no fees, which the Court granted, and gave it for a Rule that on all Habeas Corpus in Civil causes, the party that procureth it, shall tender reasonable Fees to the Goaler; and if he demand unreasonable, the Court will here certifie it.

Pains Case.

(12) Perjury.

THe Court refused to stay Judgment on Conviction of Perjury, on Suggestion of a Prosecution against the Testimony, ready for a Trial, in the same point, by the end of the Term: in regard the Prisoner could not produce present Creditable persons of his behaviour, but gave Sentence of a Months Imprisonment; and on 2 days in Westm. and Cheap-

Cheapside to stand in the Term on the Pillory, with a Paper declaring his offence, and Fined him 100 l. the Indictment being at Common Law.

WInnington moved for a Prohibition to the Bishops Court of Exeter, the Court conceived, that Lessee of impropriator being an Hospital, is all one with Lessee of a Parson, and suit for Annuity must be in Spiritual Court; so for Tythes. Adjornatur. (13) Incumbent.

In Devise Br. 1. Snow *against* Cutler and Stanly.

Monday, Oct. 26.

IN Evidence to a Jury, the Court conceived that a Will proved 1625. and on the file in the Prerogative, need not be proved now, although possession hath gone against it: But the Council of the Defendant standing on it, it was proved. 2. The Lands were Copihold of the Feme, and she with her Husband suffers a recovery to the use of him and her for Life, Remainder to the use of the Will of the Baron, who deviseth to the Heirs of the Body of the Wife, if they shall be of, or come to fourteen; then they in the Manner according to the custom, suffer a Recovery before the Infant Born, and then the Husband dyeth, and after she Marrieth the Lessor of the Plaintiff, and then dyeth leaving Heir of fourteen, which doubted by the Court, was found by Special Verdict. 3. The Recovery was proved by Copy of the Roll under the Stewards hand, the Roll being lost tertio Car. but without proof there was such a Roll the Court refused to allow it, although possession had gone along with it according to the Recovery: And although this be Copyhold, whereof the Rolls are not in the custody of the party, but of the Lord, and no Records, but all done at one Court, and the Copy found but of late, without other concurrent Evidence of a Court then held: But, per Curiam, such a copy would be good Evidence of the Copyholders Estate, but not of such a Recovery, being a Judicial Act; but it being recited in a Roll of court within four years after, the Court admitted it. Post. (14) Remainder. Siderf. 153. pl. 2.

Noy

Noy *against* Tucker.

(15) Trials. COleman moved for a New Trial on Suggestion of Deed Inroled suddenly trumped on the Defendant at the Assizes, whereby he suffered Verdict against him, whereas there was no such Deed ever Inrolled, which the Court refused, although no remedy be against any parties for Forgery or Perjury: And by Twisden, so was the case of one Polington, who had paid Fees, but the Clerk omitted the Inrolement, and the party added it, and no remedy against him; so of Cyrograff of a Fine. But, by Keeling, such an Endorsement is Forgery, when nothing will pass without it; Sed curia contrà, that its only great Misdemeanor, but no Forgery.

Primate *against* Sir John Jackson. Ante.

(16) Trials. THe Defendant being now found Guilty of tampring with the Witnesses, with intent to keep back and stay the Trial in an Information of Perjury against Fenwicke and Holt, in a cause that concernd Sir John Jackson; Symson moved for a new Trial; which, by Keeling, is without all president, being a criminal cause; and the Chief Justice Hyde doubted it, although the cause extends not to Life, but only to Member, and the Defendant hath been once acquitted; Sed Twisden & Windham contrà, that new Trial ought to be, in regard of the Inconvenience that would ensue if such Perjuries should escape with such foul practises.

Adjornatur.

George *against* Alsop. Ante.

Tuesday, Oct. 27.

(17) Admiral. THe Suggestion that there was only Citation in the Admiralty, and Recognizance forced on the Defendant to deliver Lighters, or abide the Order of Court, being not put in, the Court refused Prohibition quousque.

James

James *against* Morgan.

IN Action upon the Case on Colloquium, on the sale of a Gelding, the Defendant promised that the said Horse should have four Shoos, and in each eight Nails; and so for the first, the Defendant was to give a Barly Corn for the second two, and four for the third, and so double to every Nail proximo, whereas it should have been prox' præcedenti. Sed non allocatur after Verdict. (18) Assumpsit.

Ayer *against* Steeply.

YOu are a Barretor and a Riotor, and I will Indict you for it; which, by Bramston, in Arrest of Judgment, is not Actionable, being not any Attorny, which the Court agreed. Judgment Staid. (19) Slander.

Siderf. 154. pl. 4. Rous *against* Lun.

IN Debt on Bond, condition to submit to Umpirage, if award were not made by a day, which was, that the Defendant should pay, as the Plaintiff and his Attorny by a Bill and Oath should make appear, which, per Curiam, is well enough, after Verdict on Issue, on no Award made, and at most, it would but be void, quoad the Attorny, were he an Estranger; but the party and his Counsel &c. are all one. (20) Arbitrement. March. 10. pl. 186.

Sherard *against* Kirkman.

IN Debt for Rent against Assignee of Term, Baily moved in Arrest of Judgment, for that the Plaintiff Counted of Lease to commence à die Mich. Post. 27 July, which was the date of the Lease: & quod Postea scil. 28 July, virtute dimissionis, the Lessee entred, which is a disseisin, according to 3 Cr. 766. Douglas *against* Sheffield: Sed curia contrà, the scil. being void. Judgment for the Plaintiff. (21) Rents.

King *against* Terry.

(22) Baſtard. COleman excepted to an Order made, for keeping a Baſtard Child, which was made on Appeal ad Seſſionem pacis in Weſtminſter, not ſaying General or Quarter Seſſions next. 2. On 18 Eliz. theſe Juſtices cannot, as they have done, confirm the firſt Order, and add further penalty, but only one. They have alſo adjudged the Defendant the reputed Father, which the former Order did not: But, per Curiam, they may alter, or enlarge at pleaſure. And as to the firſt exception both Seſſions are ſhewed particularly, and ſo it appears to the Court, none could be betwixt, and ſo ad proximam Seſſionem not neceſſary: But by Twiſden, the Juſtices on Appeal cannot refer the Order back to be altered by the firſt Juſtices, which the Court agreed: And by Hyde Chief Juſtice, on Appeal they may order the Feme to the Houſe of Correction, or alter the Maintenance, although nothing were made by the firſt Juſtices. 3. Order to keep the Child at ſo much a week, or diſcharge the Pariſh, which is good; and for eaſe of the party, the Court confirmed the Order.

Duke Lynox *againſt* Drury.

Tr. 15 Car. 2 Rot. 566.

(23) Leaſes. IN Debt for Rent, the Plaintiff counted on Articles of Agreement, per quod teſtatum ſit quod dimiſiſſet, which, by Wild, the Kings Serjeant, is ill; this Action being grounded on the demiſe, which muſt be more poſitively alledged, contrà in Covenant, which is collateral, which Twiſden and Keeling agreed: But Hyde and Windham abſente,

Adjornatur.

Bartlet *againſt* Ramſden.

Wedneſday Oct. 28.

(24) Deviſe. ON Iſſue out of the Chancery, to try whether the Plaintiff were entitled by two Writings, or any other, purporting a Will of J. S. and the Evidence was of a Feoffment to the uſe of ſuch perſon as J. S. ſhall name and appoint by his laſt Will, in which caſe the deviſees are in by the Feoffment, and not by the Will: But per Curiam, that is only

fictione

fictione Juris, but they are not in without the Will, and therefore that is the principal part of the Title; and such proof good enough, and pursuant to the Issue, and Verdict for the Plaintiff accordingly.

Greenwood.

Thursday, Oct. 29.

(25) GReenwoods Wife is a Witch, and hath bewitched B. Fleming, is Actionable, per Curiam; so to say, she had bewitched her Mothers Milk. Judgment for the Plaintiff. Slander.

The King *against* Alcock. Indictment Fitzh. 1.

(26) SHelly moved to amend an Indictment of Barretry, taken in Middlesex at the Sessions there, being by the Certiorari only a Transcript removed, which Hyde and Keeling refused, in that the custom of London to remove only tenorem, extends not to Middlesex; But Twisden contrà, as in Moors Case: Coram Rege for Domino Rege, it was on such tenor Amended, ex motione Keeling, when at the Bar: And by Windham, although this be but tenorem Recordi there, yet here its the very Record, and that below but the Transcript, and so amendable: but all agreed, that such custom extends to Records in Sessions for London and Middlesex together. Peace. Siderf. 155. pl. 5. Hub 135. pl. 180.

Adjornatur.

Munday *against* Mills.

(27) THe Defendants Wife said, J. S. hath cozened my Husband of 11 l. which 2 Cr. 427. is not Actionable, there being no Colloquium of any Trade at the time of speaking, but only that he was a Carrier of good Fame, &c. The words were farther, that he made false Letters, and gave me a false and forged Acquittance, The Court agreed the first part of the words not Actionable, Hut. 14. nor by Hyde, are the second, being uncertain what false Letters mean, and it is not said he used to carry Letters, nor are the words applied to be spoken of him in his Trade, which Keeling agreed. Slander. Siderf. 155. pl. 6.

Judgment staid quousque.

The King *against* Chaloner. Ante.

(28) Force. BAldwin excepted to Conviction of Forcible Entry, that it wanted Regis, being only Contrà Pacem Domini Caroli Secundi; also it wanted Vi & Armis intravit, which being on the Statute of 15 R. 2. is erronious: And although this be a Judgment, yet it may be quasht thus without Writ of Error, as well as a Commissioners of Sewers Order, or Conviction by Justices for being Drunk, which Twisden and Keeling agreed, and that Presidents are both ways: But by Hyde and Windham it cannot be quasht without Writ of Error; although this be not done in any Court, yet it is certified to the next Sessions, and there Recorded. And for Meverell's Case, or any President since 1640. they are not to be valued, the times being stayn'd. Adjornatur.

Kitchin and Knight *against* Bunkley. Ante.

Trin. 15 Car. 2. Rot. 1256.

(29) Assignee. JOnes moved for Judgment, the Covenant being to repair by Lessée, which is assigned to the Plaintiff. Lit. Sect. 315. 311. layeth it down as a general Rule, That in all Actions real or mixt, they shall sever; but as to Actions personal, where Damages are to be recovered, they shall joyn; on this ground he says they must joyn in Debt for Rent. The Case of Forger of Deeds is not that Tenants in Common shall sever, as 18 H. 6. 6. & 7. which is better Authority then Kell. 114. where it is said they shall sever as in Prohibition, but in Detinue, which is as real as Forgery, although it concerns the Inheritance of both, yet they may joyn, as 1 Inst. 197. And the Reason is apparent, Lands being to be recovered according to the Right, which is several Damages only according to possession, which is joynt. The Case of Hall *against* Arnald cometh not to this purpose; the only Question being, Whether the Arrears should survive; and the Case of Baker *against* Berisford is on particular Reason, being Covenant for Rent by Tenant by Custom of Moiety, and the Parcener Tenant by Discent: Also there may be difference betwixt Debt for Rent, which may be divided, and this of Damages, which is inseparable. And for this Reason they may joyn, 1 Inst. 197. as 18 Ed. 3. 90. in Warrantia Chartæ, but they may sever in Voucher; and this is a stronger Case than ours, being Covenant real. Waste is a mixt Action, yet for Waste in the tenuit,

as

as Moor 101. pl. they may joyn. Baldwin for the Defendant agréed Jones's Rule, where the poſſeſſion is only concerned, and damages only recoverable as in Treſpaſs, &c. they may joyn, in regard the intereſt there ſhall ſurvive in mixt Actions, they may joyn or ſever, as in Parco fracto, Moor 452. Wentworth *againſt* Savill: So in Account, Godbolt 90. & Hill. 19 Jac. Godbolt 283. (the Court refuſed to give any countenance to ſuch Books as Authorities any more then News Books, &c.) is neareſt to the Caſe at Bar, the perſonal Contract being determined, and the Right in the Aſſignées only by cauſe of the Reverſion, which is real, and Dy. 326. Huntley's Caſe, Moor 40. ſeveral, Litt. 71. Joynder in Action, Br. 104. A full Authority in this point is Mich. 7 Jac. C. B. Biot *againſt* the Lady Saint-Johns, Rot. 3214. in Covenant for not repairing by the Plaintiff, who was Aſſignée in Fée of two Meſſuages by ſeveral Aſſignments on ſeveral Demiſes; with which agrées 45 Ed. 3. 13. b. pl. 10. And the Court agréed, that wherever ſeveral Intereſts are in one hand, they may be joyned; but not ſo when in ſeveral hands, although the perſonal Contract be determined. 3. The Covenant was only with the Leſſor, and ſo his Aſſigns cannot bring the Action againſt the Aſſignée of the Leſſée, as here: But, per Curiam, this is Spencer's Caſe expreſly, he may make ſuch Covenants that run with the Land. Alſo by Hyde, the Reverſion is not here touched, Bendloes 89. By Twiſden they muſt joyn in Action upon the Caſe for Pew, but they muſt ſever in their Preſcriptions, and ſo they muſt in debt for Rent. And he was never ſatisfied with the Reſolution of the Caſe of Baker and Berisford, and it was reſolved that Tenants in Common muſt joyn. And Hammon *againſt* Whichelow, 2 Car. B. R. in Action upon the Caſe for Common, per quod he loſt his Cattel for want of Suſtenance, ruled not good by one. Windham agréed the Caſe of Baker *againſt* Berisford no Law, eſpecially againſt Littleton, whoſe Rule is ſafe and undoubted. Keeling, Although as a Templer bound to maintain Littleton, yet according to his Reaſon, doubted the Caſe of debt for Rent, being betwixt Aſſignées; and in all Littleton's Caſes the parties were Joyntenants of the thing ſued. And ſo in this Caſe of Covenant it is clear they may joyn, it being grounded on the poſſeſſion, which is joynt and indiviſable as to the perception of Profits, although the Inheritances be ſeveral. Judgment for the Plaintiff.

Slaughter

In Droit, Br. 16. Slaughter *againſt* Tucker.

(30) Error. WIlliams moved for a Rule abſolute, that Judgment be reverſed in a Writ of Right, being on default before Appearance, without any grand Cape, which, per Curiam, is Error. Judgment Reverſt, Niſi.

Jackman *againſt* Hatton Executor of Ryol.

(31) Aſſumpſit. IN Action upon the Caſe in conſideration the Plaintiff would forbear 100 l. (due by the Teſtator) by twelve Months next following, the Defendant would pay, &c. The Plaintiff avers that he did forbear à tempore aſſumptionis, twelve Months, which is well; contrà if it had been uſque 12 Months. Judgment for the Plaintiff apres Verdict.

The King *againſt* Pecke.

(32) Peace. ON Habeas Corpus the Defendant, Churchwarden of Hadly, was committed by the Juſtices next, as ſuch, without Bail, for refuſing to give an accompt of all Moneys received or diſburſed by him, and of all ſuch things as concern his Office, which, by Hyde, is ill, which the Court agreed: And that if he be committed as Overſeer of the Poor by 43 Eliz. 2. it muſt be ſo expreſſed in the Mittimus, although to be Overſeer be annexed to the Office of Churchwarden; for in default of accompts of Mony of the Poor, the firſt is 20 s. which muſt be mentioned before the Juſtices can commit. Alſo the accompt as Churchwarden muſt be before the Commiſſary, and in default they may Excommunicate: But ſuch accompt will not diſcharge the accompt according to the Statute of the Poors Mony: So the Court diſcharged him only for inſufficiency, and being a ſufficient perſon, would not bind him over to the next Seſſions, elſe they would.

March. 37. pl. 11.

The Lord Baltingla's Caſe *againſt* Sir Rich. Temple.

(33) Nonſuit. ON leave granted by the Court to diſcontinue, Sir Ed. Tourner prayed the diſcontinuance may be entred, which per Curiam, is needleſs; contrà on Nolle proſequi: But by Jeakill and the Clerks, it's uſual to enter on the Roll ideo diſcontinuatur: But this being a Rule of a former Term, the Defendant cannot cauſe the Rule to be entred (if the Plaintiff refuſe it) without motion.

Gilbert

Gilbert & ſa Feme *againſt* Martyn.

SAwyer moved in Arreſt of Judgment given by default in Covenant on Leaſe in O. in Com. Hampſhire, of Houſe in Berkſhire in B. and a ſpecial Breach aſſigned for not repairing, and Iſſue taken on Non infregit conventionem, and the Venire facias is Awarded de Viſineto de O. in Hampſhire, which is ill, the Breach being local: But per Curiam, this Action being brought by the parties that are privy in the firſt Contract, it's in his Election to bring the Action where he will; but when Iſſue is ſpecially joyned to a ſpecial local Breach, Hub. 187. Reeves *againſt* Moxam, the Venue muſt be of that place according to the Iſſue, 15 Ed. 4. 19. Stoker *againſt* Billeſdan, by Fincham, although the Plaintiff hath liberty to lay his Action where he will, 2 Cr. 446. Sheres *againſt* Bretton accordingly, that Breach in not repairing cannot be laid where the Leaſe was, but only where the Land is; ſo 3 Cr. 701. Williams. Alſo this is a ſpecial Tort, and not grounded on the Contract, and only this aſſigned for Breach, therefore the Non infregit conventionem modo & forma, can be only intended as to the Breach aſſigned, and tied to that, which the Court agreed; and that Venire facias ſhould be ſpecial to the place of breach, and not where the Action is, as according to the Rules of the Court it always is, unleſs ſpecially drawn into another place by Plea. Judgment ſtaid quouſque. (34) Viſne. Siderf. 157. pl. 9

Evers *againſt* Hopkins.

TRover de uno Fuſo, Angl. a Spindle for the Mill, which was moved in Arreſt of Judgment as incertain, and too general, ſignifying as well a Spindle for a Tourn, Sed non Allocatur. 2. De uno acerio promenſa, Angl. a Table-board, good. 3. De uno fornacio, Angl. a Furnace, good, being only falſe Latin, or obſolete word, and well enough. (35) Trover.

Judgment for the Plaintiff.

Siderf. 158. pl. 10. Croſſe *againſt* Bigs.

Friday, Octob. 3.

PAwlet oppoſed a Prohibition granted to the Admiralty on Suggeſtion that the Plaintiff libelled on Preſcription that the Kings have granted to the Admiral to have the order and management of all Beacons and Sea Marks, and the pro- (36) Admiral.

profits thereof, and for taking of 6 d. due for a Beacon erected on the Rock of Falmouth, 4 Inst. 149. The Libel was against the Collector, and the end hereof is only to give notice to Mariners, which doth denominate every thing, as 8 Ed. 3. 70. Hospital of Alms is Spiritual, of other ends Temporal: Also this Beacon is betwixt the High and Low-water Mark, only to give notice of that Rock, which is within the Admirals Jurisdiction; Keeling contrà, The Government of Beacons undoubtedly belongs to the Admiral, but the Profits may belong to a Subject: And here the Libel being for the Profits, it ought to be tried at Common Law. So by Windham, where the right of the thing is in question; but else the Profits may be sued for in the Admiralty, which the Court agreed. Adjornatur.

Bill Lessee of Stroud *against* Holt Chancellor of Wells.

(37) Leases. Sider f 158. pl. 11.

IN Evidence to a Jury, Mr. Attorney proposed as doubted, That a Lease by the Chancellors Predecessor is not within 32 H. 8. 28. he being infra minores ordines qui famulantur Ecclesiæ, and no Prebend, and Euston *against* Dennis, 18 Jac. a Precentor of St. Pauls, although a Prebend, is unresolved whether capable, or not, to make such a Lease; and a Prebend hath been but lately setled as able: Also this Chancellor hath a Prebend distinct, and this Impropriation is not part of his Corporation. Hyde, Hereby all the Cathedral possessions will be shaken: And by Windham, this is but a Name of Dignity annexed to the Prebendary, and they are Prebends as Sub-dean, &c. Twisden, The better Opinion of the Precentor was, that the Lease was good; but I do not remember it was adjudged so of a Treasurer; these are but Offices annexed to such Prebendary, and Keeling never doubted it: And Br. Leases, doth give the Reason why Prebend is within the Statute, in regard he is not exempted, but only Parson and Vicar. Jones for the Defendant, Lease by Prebend not warrantable by Statute is void against Successor, if unconfirmed, which is an Argument that he is not seised in Fee; and where he is seised Jure Prebendæ, it was much doubted, but now setled: But per Curiam, this being an Impropriation, cannot be annexed as an Appendant to the Office of Chancellor, but only in right of his Prebendary; and therefore his Lease is good against the Successor, without confirmation of the Dean and Chapter, and they would not suffer a Special Verdict, nor question of it. But by Tourner for the Defendant, the Chaunters of Pauls in the Case of Morrice in the Exchequer, now lately were

were held unable to make Lease, being only Singing-men, no Dignities as this is: Also after forty years possession, the Court will intend it anciently demised and demisable.

Hill *against* Kirkman.

ACtion upon the Case, by Windham, doth not lye for breaking a Wall in which the Plaintiff had no property, which was betwixt the Plaintiffs House and an Alley or Street, and making a common Passage through the Wall: For if it be the Plaintiffs, which is not alledged, Trespass lyeth; and if it be not, this Action doth not lye on such damage, that the Plaintiff is disturbed in Profit, Guests, or of his Rest, without particular damage, that the Plaintiffs House is undermined or worsted, which the Court agreed. Judgment for the Defendant. (38) Way.

David *against* Isaak and Martyn. Ante.

IN Action of Accompt against them as Bailiffs, after Judgment quod computet on default of one, and Verdict finding the other to be Bayliff, one enters into Accompt; and now Jones prayed no Judgment final may be entred against him until the other have accompted that made default. By Stroud for the Plaintiff, this Judgment quod computet is perfect against one, and only Execution staid quousque; and by 14 H. 4. 1. a Scire facias lyeth on such Judgment after the death of any Plaintiff, which the Court doubted. Also they conceived this but an Award against them only as joynt Bailiffs; and it would be inconvenient to have Judgment against one, because he that is absent may be he that received all, and the other that paid, and no Writ of Error lyeth until the other accompt; and by Windham, when it's in the Election of the party to sue, as in Trespass or Case, both or one, he may have a Judgment against one on Release of the other; and on Debt by Bond, the one must be Utlawed before the other can be proceeded against, and here the Receipts are several; but here one cannot be Utlawed, the Suit being not by Original, but by Bill; but yet he may be taken by Capias, and then compelled here, but not before. Adjornatur. (39) Accompt. Siderf. 195. pl. 12.

Hayes *againſt* Wheler.

Saturday, Oct. 31.

(40) Slander. March 107. pl. 184.

SYmſon moved for a Procedendo in Action upon the Caſe in London, on calling the Plaintiff Whore, and her Husbands Whore, ſuch offence having there a Corporal punishment by cuſtom, in 4 Co. 18. it was denied; but the laſt Authority in print in 1 Cr. 420. it was granted, which Keeling remembred: But by Hyde, it hath been often denyed. And the cuſtom is not ſufficient for Action to lye, no more is Penalty inflicted by Statute on any offence. Nor is it ſufficient that this Court hath no Juriſdiction of the offence; for this Court is to regulate others Inferior. Keeling conceived they could not eaſily convict them of Whoredom; but by Wild Recorder of London, they find her a Whore at the Wardmoot Enqueſt, and ſuch preſentment is enough for Indictment at the Seſſions in London; and being Convicted, ſhe is carted and whipt: But the cuſtom, by Twiſden, cannot come in queſtion on this Suggeſtion; but all may be done in a Writ of Error, although that be a long way about. Adjornatur.

Lee Executor of Cartwright *againſt* Rayns. Ante.

Tr. 15 Car. 2.

(41) Dayes. The Statute muſt be pleaded 1 Cr. 404. pl. 479.

WIld in Arreſt of Judgment, the day generally is not material in Action upon the caſe, but on promiſe laid twelve years ſince, H. is not concluded to give Evidence of one within ſix years; but the day is made material by the Statute, and therefore this Replication is a departure, had the Defendant demurred on the Replication, for the Court will not preſume the cauſe of Action of another time then the Plaintiff declared: If the Action be laid within ſix years its not ſufficient to plead the Statute without traverſe abſque hoc, that it was within ſix years. Keeling was now ſatisfied for the Plaintiff, that the day of it ſelf is not material, and its not departure to vary in time and place, when one purſueth the Defendants Plea: Windham agreed in omnibus; and that the Count thirteen years, and Bar quod non Aſſumpſit infrà 6 annos, with Replication, that cauſa actionis did ariſe within ſix years, is good; and not like the caſe in 1 Cr. 228. where the Variance was in the new Aſſignment,

Twiſden

Twisden agreed, so Hyde, Rogers *against* Ashton C.B. in Trespass of Assault and Battery in a Close at Deptford; the Defendant Justifies as possessed of a Gate in Chedingfield: The Plaintiff Replies that he was Churchwarden of Chedingfield, and that for a levy there he took the Beasts: The Defendant rejoyn'd that the Beasts were none of his; on which the Plaintiff demurred; and held no departure, because the Plea alter'd was only in pursuance of the Defendants Plea: So here. Judgment for the Plaintiff.

Collingwood *against* Pace in the Exchequer Chamber. Ante.

KEeling for the Defendant, as he had argued when Counsel; 1. Because the Act of Parliament doth not put them in no other condition then if they had been Subjects born, and so is the plain intent of the makers of the Acts, who would not give an Alien greater priviledges then they had themselves: And the words are plain, that to all intents and purposes they shall be taken as Subjects born, which is a Term of Similitude: And the Law of God makes our love to our selves, the measure of our neighbors: And so are the words of the Act, that Aliens should be as Subjects; and there are no words that enlarge this sense, that he shall resort and make his pedegree by any Ancestor; Lineal or Collateral, doth only remove his personal defects, not to give him new Ancestors, nor could he hereby have been Heir to his Father, who was an Alien; the Act of Parliament hath its perfect effect by making them Subjects, 1 Inst. 129. a. and two Natural Sons born in England, cannot Inherit the Father, it being not the Natural Blood simply considered, but that Blood with all legal Circumstances which the Law of England requireth; as that they be born in Wedlock, that they be of persons attainted of no crime, and that they be of Subjects born. The Blood betwixt Brothers, that makes them inheritable to each other is, that which is derived from the Patents: And here, nil dat quod non habet, they being Aliens, cannot communicate any such Blood, as by the Law of England is required to inherit. Its plain, that Brothers have no other Blood natural, nor Civil and Legal Blood, then what they have from their Parents. And although none can have Legal, but those that have the Natural Blood, yet one may want the other. Also there is no way to distinguish the whole from the half Blood, but by resorting to this commune vinculum: There are only three cases, propter defectum matrimonij, propter legeantiam, & prop- (42) Alien.

ter delictum, where the Brothers have the same natural Blood, and yet shall not inherit. The first sheweth the natural Blood is not sufficient; for although in nature they have as true a Father as any, yet by the Law of England they have no Father, and this is the very case with that in Question, and so Dr. & St. 13. an Elder Brother Alien, is persona non existens, not taken notice of by the Law of England, nor shall not stand in his younger Brothers way, no more doth the Law take any notice as to Inheritances of the Father, being an Alien. As to the other, propter delictum, such Issue is as naturally Born as any, but 3 Co. 41. Brit. cap. 5. Brack. 130. 1 Inst. 8. the Parents being disabled by the Law of England to transmit any Blood to them, they cannot inherit each other. And I see not how the case in question differs from those cited, also that one Brother may have Mordanceſter of his other Brothers Estate, doth not make him Antecessor sanguinis, but only of the Estate, and therefore as F. N. B. 195. he must say he is Brother and Heir; which is yet the question in the case at Bar, whither the one can be Heir to the other; for both are the Commencers of new Families, and the priviledges given to them are several, and not Communicable to the other. The not naming the Father in the Writ, is no objection, in regard therein no more is requisite then is necessary to the Title, as 8 Co. Buckners Case, I must shew the commencement; so of an Estate Tail: So when I claim as Cosin, I must shew coment, for the uncertainty; contrà when one claims as Brother and Heir: But yet although I need not name my Auncester in the Writ, yet the Defendant may shew any disability in the Auncester; as in Action by younger Brother, he need not name his Elder Brother, but claim of the Seisin of his Father, yet the Defendant may shew the Elder Brother survived, and was seised, 42 Ed. 3. 2. and where the Auncester is named, 1 Cr. 524. Rot. 699. Tr. 11. Car. Edwards *against* Rogers; the Heir is not always barred. In Hobbyes Case, the Attainder was after the Brother and Sister born, so not like this case. The case of Eaton, Decree 442 in the Dutchy, I agreed; and that double Blood of Father and Mother is not necessary; but if both the Children have the same Blood that any of the Parents have, its sufficient; although either of the Parties be disabled; for the half Blood is only where Issue are by several Parents, Fathers or Mothers: Also Courtnyes Case 3 Inst. is not to this purpose, unless it make for my Opinion. The case of Godfry *against* Dixon, cometh not to that in question, there being no disability either in Parents,

which

which were Denizens, nor in the Children, which were Natural born: But in the case at Bar, the disability of the Father remains to his Death. And Mountague held this expressly, that they cannot inherit in that case: And in Davise *against* Pace, 55. B. R. this point came not in question: And Foster *against* Ramsy in 1656. is of no great weight, farther then the reason, and therefore need no answer.

2. Windham observed on the Special Verdict, that Robert the Father is expressly found an Alien, and of Alien Parents, and therefore it must be intended that his Wife was no Alien, no disability being to be intended. Also here is an Office that finds the Son John an Alien, which Crumpton 54. ought to be first traversed in the hands of the King; but being granted over, it may be now traversed against Patentee. As to the case it self, I do distrust my own Judgment, which is, that the Brother shall inherit, and that Judgment ought to be given for the Plaintiff, against the Fundamental Reasons that have been alledged to the contrary: I disallow not the distinction betwixt Civil and Natural Blood, but its misapplied to this case; for no Book old or new that I find, assigns this defect of Civil Blood as disability of Alien. And in Godfry and Dixons Case, the Judges found fault with this new Term, and said this disability was not by reason of Blood, but of the place of Legiance; so in the Civil Law; but this is a metaphorical Speech; when the parties cannot inherit, its a Jus sanguinis superadded to that of nature by humane Laws. He that is seised in Fée and in Tail, after Felony committed, as to the Fee, his Issue cannot inherit, but the Tail he may; So he that is English born shall inherit, but contrà, he that is born beyond Sea of English, as in France, &c. And this Civil Blood is not ex traduce, but ex impositione legis, and so not necessary to come from the Father; for he giveth no Civil Blood, but the Law: As Bastards are not so, because the Father is such, so nil dat quod non habet holds not here; the Law only determines Civil Blood, not the Parents; which hath been the Foundation of the Arguments for the Defendant. The Law extends the disability of Aliens upward, so as to set aside only himself and Issue, not any that claim not from him, 31 Ed. 1. Cosinage 5. This is the difference betwixt Alien and person Attainted; for Attainder corrupts upward and downward. But 2 if the Lands move from the Alien himself, none upward or downward can inherit: But if, as the case at Bar, the Lands move from any beneath the Alien, they may inherit; for its the Gift that is to be respected; not

not the Stocks, for of this it only takes nourishment, but renders its own proper fruit; as Quince on a Crab will bear Quinces, so here, the Brothers are as born in England, and have only alimentum from the Stock, not any alteration of their swætness. I agree the case of Mordancester, that Brother must be said also Heir, this proves him not Heir, or the other his Auncester, but that the discent betwixt them is as immediate as betwixt Father and Son. 3. The Incapacity of an Alien is only restrained to such as claim Jure repræsentationis of the Alien, and ariseth only ex loco, and so doth not Transmit it self to all the Blood, as the Poyson of Attainder. 4. Admit the Brother hath no capacity from his Father, yet he hath from his Mother, who is not found an Alien, and that is sufficient; where the Father is as persona non existens; for there is no half Blood as to Mother and Son, but only betwixt Brothers. 5. Its not the Office of Judges to enlarge incapacities farther then they have express Warrant from our Law, & sub silentio, I believe many Issue of Scotch Parents have inherited, and the Law takes place with me, and therefore an Incapacity ought to be shewed on the other side. I have not found any such Objection against the Brothers, that the Father was disabled; The Books do not warrant Cooks Opinion, which is not hereby weakned, in that he doth not affirm them all to be Laws: I think Courtnys Case is against me, but not in the Judgment of it, compared with Vinians Case Dy. for this was of an Attainder which goeth to the whole Family; but the saying the Son of a person Attainted could have no other Heirs but lineal, is expressly resolved contrà in 36 Eliz. and that the Brother of such Son may inherit; yet the Attainder corrupts the Blood ab origine; for a Son born before, during the Attainder, is in the same capacity, so long as the Attainder continues, with a Son born after Attainder. And Hobbyes Case is stronger for me then this case: I am not satisfied with any difference of this case at Bar, from the Case of Godfry *against* Dixon, for it was an Alien (not a Denizen) had Issue a Son, and after Denization hath Issue another, which differs not quoad the Brothers at all from our case. Also according to the Arguments on the other side, H. born in England of Alien cannot inherit, for the Denization is only ex nunc, and cureth nothing of the Elder brothers Disability. 2. Turning the Case, that these Brothers are Aliens born, then the Act of Naturalization, That they shall be reputed and taken in every respect, condition and degree, your Majesties Liege Subjects,

and

and to every intent, as Subjects born in England. So the (as) relates to the latter clause, and not to the former, in which case, the making them Liege Subjects, doth take away all their defects of Legiance in the Father, as well as himself, both being in the same person, and of one and the same kind; the words no more restraining Liege to the Father then the Son: General words would have extended only to natural Birth, but here is a superaddition of proper words to make him Liege, which is a sufficient word, without other Addition, to cure all defects of Legiance: And the Resort and Pedegrée must be intended to such Auncesters as were naturally so in blood, before only incapacitated by Non-Legiance, which being taken away, although such had been no Auncester before, yet now they are; and in this case, there is no other defect of the persons, but the want of Legiance in the Father, which is cured, yet the half blood is not hereby cured for want of words: And the latter clause is rather added for Enlargement then Restraint, in that favores sunt amplificandi, as of the Donati Civitatis in Rome, where if either side had Jus Civitatis, the Issue Enjoyd it, as Godwin, The like of Manumission, which for an hour dischargeth Villenage for ever.

Wednesday, No. 4.

WIld the Kings Serjeant, moved for a Prohibition to the Hundred Court of Dover, in a Writ of Partition brought by Tenant in Dower of the Moiety by custom, grounded on 32 H. 8. which lieth not there, per Curiam; but Feme of Tenant in Fee doth there Recover by meets and bounds, and is no Tenant in common; but contrà of Feme of one Tenant in Common, as this case at bar was. Prohibition granted, Nisi. (43) Partition.

Franklyn *against* Sylvester.

COleman moved for a Supersedeas to a Procedendo on a Cause removed out of London by Habeas Corpus, and Bail put in here, after which the Principal rendred himself in discharge of his Bail, but by Covin had provided persons that Rescued him out of the hands of the Tipstaff, which, per Curiam, is no Render at all, being ineffectual: But if there be no practice in the Bayl below, they are discharged by putting in Bail above, although it were allowed below. Adjornatur. (44) London.

Siderf.

Sir Charles Stanly and Andrews.

(45) Force. Evidence to the Jury, it was agréed by the Court, That he that séeth a Fray, and casually assists against the Law, if any be slain, it's Murder in such Assistant, especially if he know what the Cause is, whether an Arrest, or what it is. 2. If a man be kill'd by whomsoever, those that resist Bayly or Officer are Guilty of Murder: So of Péers, or any arrested by erronious Process.

Fryser *against* Brook.

(46) Trades. POwis moved in Arrest of Judgment in an Action on 5 Eliz. of Labourers 4.20. for exercising the Trade of Chandler, brought originally in B.R. the Offence being alledged at Newcastle, which, as Naylor *against* Ash, is naught, Styles 223. pl. 507. and by the Statute of 21 Jac. ought to be first brought below, being not tied to any of the Courts at Westminster, as the rest are: The Court agréed, that any Cause of Action for Offence in Middlesex, may be laid in B.R. but dubitatur in this Case. Adjornatur.

Sir Tho. Draper.

(47) Enquest. THe Court spared him from being sworn on the Grand Jury of Middlesex, although he had a House here, and his Family here in Term time, but seldom else, on Allegation that his constant Residence was in Berkshire.

Smith *against* Trimnell.

Friday, Nov. 6.

(48) Nusance. IN Action upon the Case for Continuance of Wall, by which the Plaintiffs Lights were penitus obstupatæ in an ancient House; after Verdict, Smith conceived it well enough, as H. 9. Car. Rot. 133. Stonehouse *against* Corbet in wast ad exhæredationem of H. in Reversion, alledging Tenant in Tail dead, but not saying without Issue, which shall after Verdict be intended; so shall this Wall be intended a Nusance, as alledged, being so found: But, per Curiam, the Plaintiff ought to shew the Wall was new. Judgment staid.

The

The King *against* Challoner. Ante.

THe Court on View of Presidents conceived this Conviction quashable by motion, without Writ of Error; and the Fault assigned was in the Caption that was alledged Anno Domini Car. 2. Angliæ 15. &c. (not saying Regis) which per Curiam, shall be intended, but however is well enough in the Caption; contrà of such fault in the Indictment, as Moors Case, 9 Car. 1. Also it was quod disseisiverunt, not saying inde, which, per Curiam, is ill also in the Indictment or Conviction; but this is only in the parties complaint before them, which is well enough, & confirmatur le Conviction: But in regard the Justices on the View had restored the Informer, and altered the Defendants possession, the Court, on submission of the party to Fine, ordered possession to the Defendant. (49) Peace.

In Baron & Feme, Br. 1. The King *against* Chedwick.

BAron & Feme convicted of Perjury, the only is taken, and Powis prayed she might stay till the Husband came in to receive Judgment together, which the Court denied. Stroud moved in Arrest of Judgment, that the Indictment was joynt, which, per Curiam, is well enough: So of the Issue joyntly taken. Adjornatur. (50) Baron & Feme.

Collingwood *against* Pace in the Exchequer Chamber. Ante.

Saturday, Nov. 7.

BRown, Justice of C. B. This Case is without President, and therefore as Postnati 41. we must recurrere ad rationem, as previous to my Argument; I exclude the two elder Brothers, Patrick and Nich. and his Son, and assist the two younger, John and George, who being Aliens can take nothing, Lict. 129. being such as is not born within the Kings Legiance, but within the Legiance of a Stranger; and that H. is an Alien is the Plea, 6 Ed. 3. 22. not that he wants blood: Nor is this by the Law of God that he is excluded, but only particular Constitutions of particular Kingdoms: and the consequence hereof is, that being born out of the Kings Legeancy, he hath no inheritable blood; so that Patrick, the Son of Nich. although a Denizen, shall not inherit, his Father being also alive, but yet the Law takes notice of him to protect him, so that it's Murder to kill (51) Alien. In Denizen, Br. 7.

him; and 39 Ass. 18. Dy. 222. will try whether he be so; and the Law takes notice of his blood, 3 Cr. 683. Box *against* Philips, to make him Administrator as next of Kindred, so Caroons Case, 1 Cr. yet the prudence of the Law is such, that it will not permit them to purchase any Lands, nor doth it give them any for the danger in our Island, in regard strength will follow possession of Lands, 2 Inst. 583. and for this cause the King seised the Possessions of Priors Aliens, and this is the cause that the King doth seise the Lands of others, 42 Ed. 3. 2. and these being excluded, I shall clear the Discent against the Title of the Escheat, which is not favoured in Law; and here is neither delictum nor defectum Sanguinis, and so there be any Tenant, by how weak Title soever, the Lord shall not have it, as Baron discontinues the Lands of the Wife, and dyeth without Heirs, the Lord shall not have the Land, 6 H. 4. 3. So of Feoffee of Infant, who dyeth without Heir; also Escheats may be prevented by devise, 2 Co. Epist. in fine, saith, There hath been scarce two Questions in all his time on Escheats and Discents, yet here are both grounded on his Opinion, 1 Inst. 8. But I deny the grounds thereof; as the Brothers cannot inherit each other, because they cannot inherit the Father, this was ruled contrary in Hobbies Case, where the Father had no inheritable blood at the time of the Discent, and that they had before is all gone by the Attainder, so is the Marquess of Exeters Case, 3 Inst. and the blood of the Mother will not support, for the blood of the Father must first take according to the Book, 49 Ed. 3. 12. but yet the Heir of the Mother shall take her Inheritance notwithstanding the Attainder of the Father, because in conveyance to this Land, 1 Inst. 187. no mention need be made of the Father, and her blood remains intire notwithstanding his Attainder, 4 Ass. 4. Baron & Feme Joyntenants, he is attainted, her Heir shall take; the being an Alien is an Impediment, no personal defect, and favoured more then persons attainted, Dyer 159. 6 H. 7. 15. they are enabled to sue, 2 Cr. Trulock *against* Morice. Action upon the Case for slanderous words lyeth for him notwithstanding his disability. I do conceive, that every one that is liber & legalis homo hath two bloods, Auncestrel which inables Discents, and a Personal blood, whereby men are inabled to purchase and leave unto their Heirs; and every Purchaser of Lands, as to that, is become a common Auncestor, and all the Lines of Discent are to be made from him, and no farther the Law regards this blood more than the blood of the Father, Litt. Sect. 6. The Lands of the elder Brother shall not go to the younger by another Venter, although both

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are Heirs to the Father: So Litt. Sect. 4. there is a Nota on this difference betwixt Purchase and Discent. 2. There is need of inheritable blood of any Ancester to H. that conveys from the first Purchaser, as Aiel pier & fits, the Grandfather is attainted, the Father purchaseth, the Son shall inherit; so if he were Alien or Bastard: And that these are all recta linea doth not create any difference from Brothers who are Collateral, for the blood is the same; and in all, regard is only to be had to the first Purchaser. The Books on which I ground this Opinion are 49 Ed. 3. 12. & 39 Ed. 3. 30. where the difference is as Pl. Com. 487. Clere *against* Hadly, that where the Father is the purchasor, the Discent must relate to him. 3. The conveyance of the Title need not mention the Father, but Fraternitas qua fraternitas facit hæredem, as well as filiatio qua filiatio; and the discent betwixt Brothers is as immediate as from the Father to the Son, as Litt. Sect. 3. proveth, and where the Father need not be named, no impediment can be objected; and however it's said that this is only rem breviter narrare, yet as 8 H. 6. 2. 1 Inst. 11. & 115. this Argument from Pleading and Entries is very sufficient in Law, which is agreed, Bar. F. 315. & 17 Ed. 4. 1. by Billing Chief Justice; and the disability of such person hurts not the Son: So 1 Cr. Broadstock *against* Rogers was adjudged accordingly of a Fine levied by such persons from whom H. claims, only by way of pedigree. 4. Upon the Act of Naturalization this is stronger, for the discent from an Alien naturalized, is as one attainted and pardoned, and these words are very large. None will doubt but the Parliament may make them inheritable, but whether this hath done so, is doubted: But unless it had been said in terminis they shall inherit each other, the words are large enough to make them so, especially if every word be made significant, F.N.B. 195. Register 294. 1 Cr. 235. one Brother is an Ancestor to another: and here all Impediments above them are removed by the intent of the Makers, who otherways had made them but half Brothers. Dyer 274. is a stronger Case then this, the restitution being only in blood to the Father only, who was attainted, yet having general words of resort to any Ancestor, &c. it was held that the Son may have Petition, as Heir to his Uncle; in Godfrey and Dixons Case, every one of the Judges agreed, and spake, but argued not, in regard four Arguments had been at the Bar; all agreed that Naturalization shall not relate but only to the time of the making. And Starky *against* Tredway, Mich. 1657. C.B. in this very Case at Barr, the Court were against the Escheat for John the Son of George the now Plaintiff: And I conceive Judgment ought to be now for him.

2. Tourner, third Baron, ad idem for the Plaintiff. It's generally and regularly true by the Law of God and Man, Numb. 27. & Grotius lib. 2. cap. 7. that Brothers may inherit each other, and the disability therefore lyeth on the other side to shew. The Argument from 1 Inst. 8. is ex male suppositis, for there is not any hereditable blood here necessary: Nor is any inheritable blood transmitted from the Father to the Son by generation, as is said to be vehiculum hæreditatis; nay, there is no such thing as heritable blood in any person whatsoever, it's but a meer phrase and notion, and cannot be a quality in the blood, as is supposed, nec habet suum esse naturale vel artificiale; nor is there any use of such blood, unless in reference to discents, and here it's useless. In the beginning, all things were in common, and propriety introduced by assent, and as a consequent thereof, every man might dispose of what he had; and on default of disposition, the Law gave it to whom the Law supposed he loved best, viz. his Children; and should the Law suppose men loved their Neighbours best, the Law would give it to them; and it cannot be intended that H. loved his Child attainted, being communis hostis, and uncapable to retain. Also the Law will not give unto a Bastard, because the Father hath no Assurance that the Child is his: As for Legitimate Children he hath on her solemn Vows, and why Bastard shall not inherit the Mother, is because the Law presumes this a Reproach to her, and born in sin; this inheritable blood is an expression of use, when one may, or may not inherit, but without any propriety, only tropical and metaphorical; for one cannot have blood and no blood at the same time, which he must have, should he be enabled to take as Purchaser after pardon, and disabled as to that before Attainder. But 2. if there were any such blood, it is in this Case, there being no Law of man that puts any impediment or disability on Aliens; not the Scotch Laws, none will disable themselves; but if any, it's our English Laws, which at this time could not have put any disability on Foreign blood not to our English Lands; if any Law could do it, it would be our Statute Law: But Parliaments before the Accession of the Crown of Scotland, could not affect them with any intrinsick disability; their Omnipotency is circumscribed, as the power of Natural Agents, to the Sphere of their Activity; Subjection and Obligation are reciprocal, Laws themselves have their Laws, and such a Law could not reach their persons. It's one thing to give a benefit to one that desires it, as to Naturalize Aliens, another to bind those that are unwilling: As to Enact that the French should observe our Fast, is void; our Laws may affect English that go

beyond

beyond Sea, but not such as are originally out of the reach of them. 3. If they could affect the blood of Aliens, yet it would be more convenient to lay the Impediment on our Lands here, as our Laws have done, then on the persons; and our Law doth thus disable them as fully, as if it could lay an Impediment on their blood: So by making Lands Burg-English or Gavelkind, the Law will carry the Discent accordingly; if the Impediment should lye on the blood, the inconvenience would be, that H. should not inherit to one that is inabled to purchase and retain, because an Ancestor that is a Stranger hath disabled their blood; and the Common Law never works so irregularly in Discents, as it doth with Uses and Estates, as to disable at one, and inable at another time. Also it's said by Prisot in 22 H. 6. 18. that Succession is guided by Law. 4. This inheritable blood is not transmitted, being not natural, which is not alterable by any Law, nor artificial, which can have nothing to do with Nature. When propriety was first induced, before inheriting created, had the Father left two Sons, the one shall inherit the other, and the presumption that the Education of the Sons, being under an Alien Father, will savour of his principles, and so they should not inherit each other, nor to any, doth not make against us, for our Law will trust Aliens with some Lands, not others; as the Son of Feme marrying an Alien, shall inherit his Mother, but not his Father. 5. As to the present Act of Parliament, the Clauses being distinct, cannot refer one to the other, as Windham and Brown had agreed. If privileges be odious in any Case, it's when they bring inconvenience to a third person, which is not in our Case, which the farther is by Act of Parliament, not by Letters Patents: And in Exposition of Acts, we must not depart from propriety, unless there be great cause, as that the Act would be absurd, unjust, or inconvenient with another Exposition; this Act is to be taken favourably, in that it doth but restore men to the Law of Nature. Post.

Siderf. 162. pl. 17. Herbert *against* Turball.

Monday, Nov. 9.

AN Infant makes a Will under the Age of 21 years, and when of age dyeth without publication, it's void; But, per Curiam, if after age he new publisheth it, it's good: So if the publication were (as in the Case at Bar) on the same day that he came of age, which was the day also of his death; also by Keeling and Hyde, and not denied, that H. born the 16th of February (52) Infant.

February 1608. is the 15th of February (1629.) 21 years after of full age, and whatever hour he were born is not material, there being no fraction of days. Also by Twisden, Will made on the day that H. cometh on age, is good, which was agréed also in Evidence to a Jury at Bar.

Siderf. 163. pl. 18. Brown *against* Spence. Ante.

(53) Incumbent. IN Evidence to a Jury, it was proved that Dr. Geery Lesor of the Plaintiff, had read the Articles in several Churches, Hamlets of the Mother Parish-Church, having only sent his Servant to demand the Keys of the Defendant, without any personal endeavour to read them at the Cathedral Church, which the Court inclined was not sufficient. 2. The acceptance of a second Benefice, after Sequestration of the former in time of War, is not plurality within 21 H. 8. It was prested to be specially found by Sir J. Palmer the Kings Attorney, for the Plaintiff. Also presentation made from the King pleno Jure vel quocunque alio titulo, when there is one in due possession, is void, unless Title be made to the King, as Greens Case, for the King cannot usurp, by Windham and Hyde against Twisden and Keeling, for although the Institution be a Judicial act, yet the foundation thereof is gone, as 2 Cr. 232. 3. The confirmation of a Parson to the latter Living by the Act of Ministers, 12 Car. 2. doth not make the former void, without proof that the Parson was Instituted and Inducted to the second, and did make his Election to continue in it. But the Counsel for the Plaintiff not attending to draw Special Verdict as they ought at their peril, there was a general Verdict for the Defendant.

Primate *against* Sir John Jackson. Ante.

Tuesday, Novemb. 10.

(54) Perjury. TWisden, Hyde, and Keeling on Conference and Opinion of Bridgman, and the rest of Serjeants Inn, conceived no new Trial ought to be granted, in that the Fame, which is dearer then any sober mans Life, is in question, and this is without all Prescident. Windham contrà, That all Laws agrée against such Escape of the punishment by multiplying his Crime, if by his Innocency he be cleared, its otherways.

Thyn

Thyn *againſt* Thyn. Ante.

Hill. 12 & 13 Car. 2. Rot. 448.

ISſue out of Chancery, whether Tayl were cut off of the Manor in queſtion, and of Near-Mead and Leverton Lees, (25) Recovery. the Special Verdict find theſe Lands no parcel of the Manor, but demiſed by Copy as parcel in the time of E. 6. and ever ſince in Reputation, the Manor and both the Cloſes are in one mans poſſeſſion: and whether by 80 years poſſeſſion this will paſs per nomen Manerij in common Recovery, is the queſtion. Jones for the Plaintiff conceived it did, though without Act of Parliament Lands can neither be made a Manor, nor parcel; but the name of the Manor is only ſuch a deſcription of the thing that may make it known to the Viſinage, as Sir Moil Finch's Caſe, which differs not from ours, being only of Manor in Reputation in a Fine. The Objection, that the Demand is ſatisfied by the Manor, without theſe Lands will make no difference, for we muſt look to the intention of the parties, which cannot be ſatisfied, without theſe Lands paſs alſo as parcel expreſly in this point, is the Caſe, 1 Cr. 308. Sir George Symonds Caſe, there being only a Reputation but for five years, and in a Fine which differs not from Recovery; alſo the contrary would be very inconvenient to Purchaſers, who by often changing have made many parts of Manor ſeparate, and no parcels. Winnington for the Defendant, The Recovery is only de Manerio cum pertinentiis, although the Bargain and Sale precedent, which (ſignifieth nothing, being only to make Tenant to the Præcipe, have ample words to paſs the Manor, and theſe parcels by particular names) as Lands, Pl. Com. 168. they cannot be parcel of other Lands, but may paſs by general Reputation with this difference, when there is nothing but what is in Reputation that paſſeth: but here is a real Manor that paſſeth by the Recovery; and therefore other Lands that are only parcel in Reputation ſhall not paſs like an Eſtople, which cannot paſs part ſo, and part by way of Intereſt, 2 Co. Sir R. Heyward's Caſe. Nor can any Conveyance go to two intents, or two ſeveral ways; which double intent muſt be here to make the Grant good, Hub. 171. A miſtake of the place or thing doth only cauſe an abridgment of the Grant, but doth not make it void in all: So Dyer 376. on miſtake of perſon: So Ognell's Caſe, on miſtake of Inferiour Termor. Alſo this is rather a queſtion of fact, the Iſſue being, whether the Tayl were

were doubt by Recovery, and not whither they were parcel, or not. Keeling conceived the Question proper, and so found, leaving it to the Judgment of the Court, whither by such reputation it will pass as parcel. He also held strongly, that the Closes pass as parcel by this Reputation. Windham held this case different from Sir Moil Finches, and from the other of Fine, in that Præcipe must demand things according to truth; but doubted it as considerable point; Twisden accordingly: And the Remainder of Tenancy for Life, although really parcel of the Manor, will not pass, as in Fine it will by such general words. And Sir Moil Finches Case was only carried by Cooke, when Chief Justice, against the Resolution of all the Judges, and therefore it is not to be extended; although Sir Moil Finches Case be not to be questioned, for the many Estates that depend on it. Adjornatur.

Siderf. 163. pl. 19. Web *against* Dyer.

(56) Encumbent. JOnes prayed no Prohibition may be granted, in that Tenant of Impropriate Rectory, now in the hands of Lay-Hospital is such a person, that by the Vicar may be sued in the Spiritual Court. Winnington contrà; that prima facie, all Hospitals are Lay-Fée, and therefore ought not to be sued in the Spiritual Court; the Court would not grant a Prohibition, the Suit being against Parishioner Tenant for Life, 12 Co. 66. is stronger then this: So would they had the Plaintiff sued as Impropriator, But if it be 1 Rich. 3. 4. specially alledged that he hath them by Act of Dissolution, &c. its a good Plea for Prohibition where the Impropriator is sued, 46 Ed. 3. 32.

Edgar *against* Chut.

(57) Merchants. IN Action upon the Case on a Bill of Exchange grounded on custom of Merchants, that when ever any such, or other negotiating for them with any other Merchants in England, have Bills directed to them, that if H. to whom such Bills are directed, refuse to accept on sight, or to pay such Bills, then he that drew it ought: Both being, by the custom to be Merchants, the bearer as well as the drawer. And the Plaintiff having not shewed that the Bearer was such a Merchant, or person negotiating, it was moved by Winnington to Arrest Judgment. But, by Jones for the Plaintiff, such Merchant is to be referred only to him to whom the Bill is directed, and to the procurers of such Bill, and not of the

the Drawers, or they for whose use the Money is to be paid, which the Court agreed. Judgment for the Plaintiff.

Lord Rosses Case.

MOuntague prayed a Prohibition, on Suggestion of a citation out of the Diocels by the Dean of the Arches in suit there, pro restitutione Officiorum & debitorum personalium conjugalium by his Wife, which the Court granted Nisi; although, by Windham, it is doubtful whither 23 H. 8. doth extend to Transitory causes of Action, where the Plaintiff liveth in one Diocess, and the Defendant in another: But such follow the form of the Plaintiffs abode, but the Wife is intended to inhabit where the Husband dwelleth. (58) Baron & Feme.

Gifford *against* Bond and Pococke.

THe Plaintiff giveth a Warrant of Attorny to acknowledge satisfaction of any Judgment that is, or may be had against Bond, whereby Execution may be had: By vertue of this, the Attorny may acknowledge Satisfaction on a Judgment had against Bond, Pococke, and Becks, for if any of the parties be sufficiently named, its enough; and Judgment against three, is sufficient for acknowledgment of one against two; but not contrà. (59) Judgment.

Pretty *against* Roberts. In Count. Br. 6.

Wednesday, No. 11.

IN Debt upon Obligation dated in Surry, brought in London, and brought hither by Habeas Corpus, one Blumley of the Inner Temple had pleaded the Statute of 6 Rich. 2. cap. 2. proces 10. that all Obligations ought to be sued in their proper Counties, as dated, and prayed Judgment of this Writ, which, per Curiam, is a frivolous Plea. And Hyde Chief Justice, would have forejudged him the Bar for pleading it, the Law being clear, 21 Ed. 4. 26. that unless the Obligation appear in the Count, or on the pleading to be out of the County, although it bare date out, its not material where its brought. (60) Lieu.

Franklin *against* Sylvester. Ante.

(61) Bail. THe Bail above was only de bene esse, but never accepted, but the three Terms were out, whereby according to the course of the Court they were absolute: Also the fraud was after the Render at a Tavern, to which the Tipstaff carried him in the way to Prison; yet, per Curiam, the whole was but a design, and therefore the Bail below must stand, and Procedendo was awarded on Habeas Corpus, But on sight of Agreement in writing of the Plaintiff, to discharge the Action on promise to pay, &c. they granted Supersedeas, conceiving the Action good against all.

The King *against* Prin. Ante.

(62) Mandamus. POwis now excepted to the Return of Mandamus, there being no cause specified of his amoval, which at Common Law is necessary, as Bags Case 11 Co. and so it is on this Act of 13 Car. 2. in that the Commissioners are made Judges, who do always determine ex causis, and else the Kings best Subjects may be turnd out without remedy. 2. It can never be intended, should the former be admitted, that they may turn him out without Summons, for otherways they can never know whither such a person be fit and able. Also the meaning of the Parliament was only to give a like power to them, as to the Judges of Oyer and Terminer, whose power is impliedly to do this: And suitable to this is the exposition of 11 H. 7. cap. 3. the Commissions of Emson and Dudly, which, as all doubtful words in Statutes, must be expounded for the hearing of the party; and else this Act being against Magna Charta 29. would be void, which is enough, however, to bough the Interpretation rather according to it, then otherway; this is also against natural Equity, which Hub. 33. is void: This Act is like 6 H. 6. 5. & 23 H. 8. 5. of Sewers, which hath as large words as this, being to proceed according to discretion, 10 Co. 140. which is always expounded, to be in legal way. Also the Parliament themselves, as in 28 Ed. 3. Nu. 8. And 10. and Mortimers Case cannot proceed against any, without hearing or Summons; and for this cause his Attainder was adjudged void 28 Ed. 3. Nu. 13. &c. the Lord Arundels Case according, Com. Br. 3. the Kings Commissioners to proceed without Summons is void. But Twisden took a suddain exception, that its not said in the Return that Mr. Prin was Recorder, 24 Dec. 1661.

and

and otherways, the Commissioners have no power by the Act to turn him out; which Keeling conceived shall be intended: Windham agreed with Twisden, who also doubted whither the Act were general, or but particular. Keeling held it general concerning the Government; but, by Hyde, there being mention of the Act in the Return, and that by Commissioners, by vertue thereof he was turnd out, the Court must now take notice of it. Adjornatur.

Davie *against* Isaak and Martyn. Ante.

STroud playd Judgment against Martyn on the Verdict, there being no other remedy, in that a Capias lieth not here, the accompt being by Bill, on the reason of 41 Ed. 3. 3. pl. 30. But by Twisden, that Book is against the Plaintiff; and there is no other Process but by capias in infinitum, which lieth here on Bill by constant course: But the party cannot be Utlawed on such capias, but only have an Alias. Keeling doubted not, but that one might refuse to have accompted till process determined against the other; but when one cometh in, and accounts voluntarily, Judgment may now be against him alone well enough. Windham conceived an accompt is not of the nature of debt, but several, for which each is chargeable with his own Receipts, as one Executor de son tort can do no hurt to another, and so Judgment may be against one. Twisden conceived this Action joynt, and the Receipt of one Bayly, is the receipt of the other; Also Auditors cannot be assigned to one, till the other come in, and therefore his voluntary coming in to accompt, is to no purpose, although the Suit be by Bill, and not by Original, as 41 Ed. 3. 3. Hyde, The action is joynt, and not like the charging of Guardians in Soccage, as Bailiffs, whose Receipts are several, and shall not charge each other, as when they are Originally (as in the case at Bar) constituted and charged as Bailiffs. Also it doth not appear that any Capias or Alias is awarded against the other, which perhaps might alter the case; yet he that is in default shall have advantage of the discharge of him that appears, and ought to shew if he hath any Release or other Discharge: Also he that comes in, ought before the Auditors to plead that they are not joint Bailiffs, but having passed that time, he cannot now assign it in Arrest of Judgment, but it ought to come in by Certificate of the Auditors, unless it were pleaded by the Defendant when he cometh in on the Capias ad computandum, Judgment for the Plaintiff per Curiam; præter

(63) Account.

As 45 Ed. 3. 24. pl. 29.

Twisden, against him that was Convicted to accompt: But Jones in Arrest of Judgment, prayed new Venire Facias, in that the Verdict finds the Defendant Bailiff for part of the time mentioned in the Count, and says nothing to the residue, which per Curiam is ill, and had been Error if second Judgment had been given; but being moved before a new Venire facias was awarded.

Endict, F. 1. The King *against* Alcocke. Ante.

(64) Place. COleman prayed an amendment of the Record of Conviction of barretry, removed hither from Sessions of Middlesex, according to the Original in the Sessions, which Hyde denied on sight of President, Pasch. 9. Car. 1. where Commissioners of Bankrupt were removed out of London, and resolved that Records may be here amended according to the Record below by their custom, but not elsewhere. Keeling 12 H. 7. 25. 2 Cr. 276. yet the King may alledge diminution, and have a new Certiorari, as was resolved Rot. 3. Collier, Tr. 41. Eliz. B. R. and so on omission of ad Comitat. tent. in Indictment and utlawry of Murder; so Tr. 3 Car. 1. Plums Case in an Indictment of Murder. And Windham agreed it amendable as well as in C. B. And by Twisden in Samsons Case, although the Lords by Escheat cannot alledge diminution on Utlawry of Murder, yet the King may; and so may Amicus Curiæ ad informand. Conscientiam Curiæ: But how far this is allowable, was doubted; in that hereby all manner of Indictments of force would be amended, which would be very inconvenient: The C. B. is not to be compared to other Inferior Courts, although by course of the Courts, they remove the Record it self; also per Curiam, as Sir Anthony Ashtons Case no diminution can be assigned by the party for the King, but only by the Kings Attorny, who is for him, ad lucrand. & perdend. and then only to such places as have full Records, and not only Notes of Clerks.

Cole *against* Skinner.

Thursday, No. 12.

(65) Partition. IN Ejectment, the Ouster was confessed of a third part, of a fourth part, of a fifth part in Five to be divided, which by Hide, is very inconvenient, and crept in since the new Rule of leaving Declarations, the Lands lying in several places distinct from each other, and may be held by several

veral Titles, which could never be had, the old course of actuall Ejectment continued; but on Suggestion that the Title was but one, and one Plaintiff, and one Defendant, it was admitted. 2. The Limitation of the Estate by Sir Peter Vanlore, by Covenant to stand seised of the fifth part to the use of four Daughters, and their Issue in Tayl, and so to the fifth; and on default of such Issue in any one, her part to go to the Survivors, according to their several shares and proportions before limited, and to the Heirs of their Bodies, which, by Jones for the Plaintiff, shall be intended to be divided, and the Estate only as the former parts: But by Glyn for the Defendant, the Survivors are Joyntenants with several Inheritances, as Littletons Case, and so the Issue cannot take so long as any of the Daughters are living, which the Court directed to be found specially: And Windham agreed, that had the Limitation been to the Survivors and their Heirs Males, according to their several shares, they had been Joyntenants, but this is several. Twisden said, That the Devise to A. B. and C. and their Heirs respectively, were Tenants in Common, and the discent is intended per Stipites, not per Capita.

The Lord Rosses Case, Ante.

(66) By Hyde, after Prohibition awarded, the Court will not take notice of the Remission of the Court by inferiour Ordinary, shewing the Instrument by Suggestion only; but contrary here, no Prohibition being awarded, but only Nisi, which the Court agreed. Also a Remission by the Official of the Bishop, is good within 23 H. 8. cap. Whereupon the Court discharged the Rule for a Prohibition. Prohibition.

The Town of Wigon *against* Pilkington.

(67) The Town Returned that they removed him from the place of Alderman, for that contrary to his Oath, Spoliavit & dilaceravit quædam recorda of such a Court which was after presented, without shewing the Presentment: which, per Curiam, is well enough on Mandamus, in that the Record being spoiled, the Town cannot certainly shew it. Also being said contrà Officium & Juramentum, it shall be intended in a Return to be voluntary, and the Return was confirmed; although it's not said, that the Defendant was a Resident within the Precint of the Læt, to which he was Summoned. Confirmation.

The

The City of Exon *against* Morgan.

(68) Certiorari. IT's a good Return on the second Habeas Corpus, that Procedendo after the first was awarded here, and allowed in the Court below, and that their Recorder, Sir Peter Ball, was according to 21 Jac. an Ekemij then above three years, Angl. an Utter Barrester, which, per Curiam, is sufficient. So by Twisden, where the second is by practice brought by another name, as Leech *against* Brumfall. 2. It's not shewed that the Cause of an Action did arise within the Jurisdiction of the Inferiour Court, which, by Hyde Chief Justice, & Curiam, ought to be shewed; and the Court would not give leave to amend, being matter of Fact, and out of inferiour Court, although the Return were not filed, it being to oust this Court of Jurisdiction, & infrà Jurisdict. is in no Case whatever supplied when wanting, per quod the Court amerced the Mayor for not removing the Record.

The Rules of Court for *Ac etiams*.

(69) Bayl. IN Debt Ac etiam Billæ ipsius querentis versus præfat. A. Def. pro 100 l. (not saying by Contract or by Obligation.)

In Detinue pro detentione Bonorum & Catallorum ipsius querentis ad val. 100 l.

In Covenant pro fractione conventionum ad dampnum 100 l.

In Promise pro non performatione promissionum & assumptionum ad Damnum ipsius querentis ad val. 100 l.

In Trover pro conversione & dispositione Bonorum & Catallorum ipsius querentis ad val. 100.

In Trespass pro Captione & asportatione Bonorum & Catallorum (vel Captione & Effugatione Averiorum) ipsius querentis ad Damnum 100 l.

These were invented by the Clerks, for avoiding the Statute of 13 Car. 2. cap. 2. which requireth that the Cause of Action should be specified, or else no Special Bayl, unless the Sum be above 40 l. But when no Special Bayl is to be put in, no Ac etiam ought to be; but the Writ is at Common Law before; so against Executors, Administrators, &c.

Lightfoot

Lightfoot *against* Salt

IN Action upon the Case for erecting Swine-Stye, and House of Office de novo tam proper domum, that the Walls thereof were putrid, and became ruinous; and by reason of laying a Dunghil near it, and of the stinks, the Plaintiff could not live in his house, but left it for fear of Infection: The Court held this Damages not well applied, but only to the Dunghill; and the Court on Verdict will intend Dammages for no more; but however the Plaintiff need not in such Case of Nusans say his House is ancient, so long as it appears the Nusance is de novo erect. Judgment for the Plaintiff. (70) Nusance.

The King *against* Chedwick. Ante.

Friday, No. 13.

PEr Curiam at Common Law one may be Indicted for false Oath before Justice of Peace, per quod I was bound to the Peace: So in Chancery on contempt; and its not necessary the Oath should be material to the Issue, which is the difference betwixt Common Law and Statute 5 Eliz. But the Oath in the Case at Bar, being that the Trunk was the Goods of J. S. and not of the Plaintiff, in an Action, wherein she was produced as witness; and the Issue was, whither certain Plate and Jewels (which revera were in that Trunk, but not so alledged) were the Goods of the Plaintiff. Adjornatur. (71) In Baron & Feme.

Tilford *against* French.

IN Debt on Award, the Plaintiff counted of Mutual agrement, and submission ad performand. an Award, which was made that the Defendant should pay 50 l. to the Plaintiff; and super receptionem inde, the plaintiff should deliver up writings, and give General Release, which after Verdict, was said insufficient, the Defendant having no remedy against the Plaintiff if he refuse to deliver the Writings. In Arrest of Judgment, Jones for the Plaintiff, Rast. Entr. Debt. in Arbitrement, This is a reciprocal promise, and therefore performance need not be averred; nor that the Submission was by Bond or promise: Also the Defendant being in default, why the Plaintiff doth not perform his part, (and in such case, it need (72) Siderf. 160. pl. 14. Arbitrement.

need only be said that they mutually submitted, as in 5 Ed. 4. 7.) and in this case the award is good for the other part. Winnington for the Defendant, the very case in point hath been adjudged for the cause, that no remedy can be had for the Release, as Mounteagle *against* Penruddock 10 Jac. C. B. Also it was resolved, no Action upon the Case lieth on such a Submission, the remedy being only on the Judgment of the Arbitrators; so was Reader *against* Palmer in B.R. 16. 57. Stiles 106. pl. 221. Twisden agreed it hath been held, as Winnington said, but nicely, for he did see no reason why an Action upon the case should not lye, in regard else their submission is fruitless. Windham, One may declare generally of so much awarded, and the Defendant may set forth the particular award; but seeing the award is set forth particularly, and it appears to be only of one side, its void: And so no Action upon the Case lieth: And by Hyde and Curiam, the Mutual Submission is no promise in it self, but only an Evidence of it; and however, without express promise, no Action upon the Case lieth in Debt, it being long before such promise was created, which is not to be extended; and therefore it self it will not create any promise, though it be evidence of it. The Plaintiff ought to discontinue, or go to new Trial in Action upon the Case on special promise.

The King *against* Burghes. Ante.

(73) Force.

IN Bar of Restitution, it was pleaded by the Defendant, Indicted of Forcible Entry, that J. S. was Tenant for Life, and his Estate continuing, the Defendant as Servant, and by his command entred and kept possession. To which the Plaintiff demurred; 1. That the Master was a Stranger, not Indicted, and so not within 31 Eliz. 11. But by Windham, the possession of Master and Servant is all one. 2. It was not shewed how the Estate of J. S. commenced, which per Curiam, is needless here; contrà in pleading. 3. There is no place nor time of the command, which, per Curiam, is needless: But to say Servant generally, is sufficient, and if it be traversed, the servant by reply must set it forth particularly. Keeling doubted the first point, in that the Defendant hath done an injury; and by 8 H. 6. the Plaintiff ought to have restitution, and therefore 31 Eliz. shall be taken strictly. But by Hyde, nothing of Conviction appears here, but only an Accusation, and the Indictment removed hither by Certiorari, and is but as an Enquisition found; and here the party pleads in Bar of Restitution, which should else

else be awarded on 8 H. 6. but not unless some Title appeared by Evidence, especially if any thing were alledged by Affidavit against it. Twisden accorded with Keeling; and it was the fault of the Servant he did not in his Indictment put in his Masters possession. Also by Twisden and Keeling, Prohibition and Restitution is of duty; and by Hyde and Windham they are only in discretion.

Gilbert *against* Martyn. Ante.

GUidet moved for Judgment, that the Action is well brought, and no mistrial, the Action of Covenant being transitory, & non infregit conventionem the Issue. Also the foundation of the Action is where the Action is brought, as 6 Co. Dowdels Case, and so like an Action of Debt brought, where the Arrest was in London on Escape in Surry: But by Twisden, there being only one Breach assigned, the Non infregit conventionem modo & forma goeth to that only: The Trial of Policy of Assurance shall be here for necessity, as 11 H. 7. 16. & Br. Visn. 19. is expressly in the point at Bar in Debt upon an Obligation, 22 H. 6. 13. pl. 19. 16 H. 7. 1. Windham agreed, That had the Issue been Special, quod reparavit, it should have been where the place is; but here the not repairing is set forth only as Evidence of Breach of Covenant: And after this General Issue taken, the Defendant may say there was no decay, and many other matters. So on Nil debet pleaded in Debt upon Escape, the Visne may be where the Action is brought, for that many things may be given in Evidence, and it lyeth on the Defendants part to make the Issue or Breach local. Keeling agreed the difference; but conceived that here the Plaintiff hath made his Breach local, in not repairing, and the Issue Non infregit conventionem prædict. refers specially to that: And by Hyde, this is a Special Issue, as well as if the Defendant had pleaded that the Houses were in good repair. Twisden accorded in omnibus, all relating to the House, and on Nil debet when General Issue was in Force, the Judges would have nothing but Nil debet. Judgment arrested. (74) Visne.

Terry *against* Couper.

(75) Slander. THe Plaintiff is run away, and is a base cheating Knave and a Rogue, and shall not think to bring W. where he is gone himself, and rather then so, I will spend 20 l. The Count was habens Colloquium of the Plaintiff, the Defendant spake these words of him, and of his Profession, which was laid to be a Lime-burner: And per Curiam, although cheating Knave be actionable, yet not with this Application, that the words were spoken of him, & de arte sua, unless the precedent discourse were of his Profession, and so they would be actionable for any Trade, as well as of Lime-burner. And so by Hyde, although he be not within the Statute of Bankrupts, as of Thatcher; but where the words themselves relate to the Profession, such Colloquium is needless, as your Counsel is a Knave, Franklins Case, adjudged actionable; and notwithstanding Verdict, the Court will not intend this application of the words to his Trade sufficient. Adjornatur.

In Disms, Br. 11. Baudink *against* Bushel.

To the Chancellor of Lincolns Court.

1 Lev. 116. S. C.

(76) Tythes. BIgland moved for Prohibition to his Court, on Suggestion of Custom that all the Occupiers and Tenants of Skegues, that are Inhabitants in any place out of the Parish, shall pay to the Vicar only 4 d. a year for every Acre; and alledging that the Plaintiff was such Occupier, and lived out, and conceived that sufficient prescription, being only in discharge of the Occupiers. But per Curiam, this is an unreasonable Custom, and only invented by the Country to cheat the Parson; also it's a leaping Custom, not fixed to any person certain, or to the Land, nor of any permanence: And by Keeling, there is no president of any modus so variable and dancing. not Law. v. Notes in 1 Lev. 116

In Disms, Br. 11. Towerson *against* Winget.

Saturday, Novemb. 14.

(77) Tythes. WIld moved for Prohibition on Suggestion of Suit in the Arches before Dr. Swet, for Tythe of Conies of Warren, without Special Custom, which was granted per totam Curiam, the Court having proceeded only on Libel; but yet

yet because the Defendant would not swear how many Cones there were, being seen in Court, without any time, presently Excommunicated him.

Wheeler & Uxor *against* Welsh & Uxor.

SYmson prayed a Procedendo to London in Action upon the Case by the Plaintiff for calling the Defendants Whore, it beeng by Custom there actionable, it being removed hither by Habeas Corpus, which the whole Court granted on View of Presidents. (78) Slander.

In Denizen, Br. 7. Collingwood *against* Pace. Ante.
In the Exchequer Chamber.

TYrrel for the Defendant according to what he had argued in the C. B. as to the Exception, that the Wife of Robert is not found an Alien, its not of force, it being expresly found that all the Children of Robert are Aliens, which necessarily intends the Wife was: So as to the main question, it depends on a due Consideration of the Nature of Escheats and Discents, the last, according to Littleton, must be of the intire blood, without which blood none can inherit the former, 3 Co. 47. Ratcliffs Case, 1 Inst. 13. Escheat is a word of Art, Fleta, lib. 6. cap. 1. Quoties hæres deficit per defectum sanguinis, or delictum Parentis; every Consanguinity is not sufficient to make an Heir, not Sanguis naturalis, nor Sanguis legitimus, for then several Venters may take, nor Sanguis integer, nor Sanguis magis dignus; filius est nomen naturæ, Hæres Juris, nor all these together, but only Sanguis Civilis & Legalis, which is the Sanguis Naturalis, with all the other Circumstances of Proximity intirely, Legality and Dignity. This is evident by shewing what blood it is that is corrupted by Attainder, which cannot be of Natural blood, 7 Co. 13. Calvins Case but only of his hereditary Blood which is ex provisione Hominis, 1 Inst. 8. Subject seized in Fée hath Issue an Alien, he shall not inherit propter defectum, not of Natural, but of Legal blood only. 2. For the Fountain of this blood, and how the Natural blood becometh Hereditary, 3 Co. 41. it cometh by procreation of one Father and Mother joyned in loyal Matrimony: And I deny that Brothers, qua Brothers, shall inherit each other; for if one be Alien or Attainted, the other shall not inherit; they are so only in respect to that common blood they have from the same Parents: Lineal blood men may have without resorting farther then themselves, but no Collateral Heir without resorting unto the common Stock; (79) Alien.

and this is the reason Bastards, who are commencers of their own families, can have no Collateral Heirs, Littl. Sect. 4. This is Littleton's account, as of two Brothers by several Venters who shall inherit, because they have only the blood of the Father: Also from him the Civil, Legal, and Hereditary blood doth flow, in whose power it is to destroy it, which is the Father. 3. As Litt. Sect. 198. it's sufficient to say the Father, Plaintiff or Demandant, is an Alien, which doth imply, Co. Entr. 62. & 482. as of Attainder, with shewing the Record, the defect of blood and it's corruption. Brothers, natural Subjects, shall not inherit each other by reason of any personal, but for their paternal blood; and where the Father is an Alien, there is no personal blood, for by generation all were Aliens, and in this state none of them could inherit each other: And the Acts of Naturalization giveth none, they remove the Alienigenity of the Brothers, but do not alter the parental blood, which it takes notice of as disabled before, and doth give resort to any Ancestor, but still such persons must be an Ancestor; for as to this, it's but expressio eorum quæ tacitè insunt in the Naturalization, the last relative Clause depends on the whole: So when it's said they shall be deemed Liege, it must also relate to the whole, although (As) be not in it; but were that middle Clause distinct and separate, yet there must be an Ancestor existing, and Lands discendable, else he cannot inherit; for this Act leaveth the Heir, Ancestor, and Discent to be guided and found out by the Rules of Law, and the Brothers might as well claim to be both Heirs to the Father, who is an Alien, as the one to the other: And the words of such Acts must be taken secundum subjectam materiam, as that they should be as Subjects who must have Parents that are so, and else an Act would create nature: Also these are but as Adscripticij in Rome, and therefore cannot have greater pre-eminence than Natives; else would it be better to be born an Alien; and that the Parliament can make such, therefore they have done it, is no good Argument: Nor doth this Act enable the person naturalized to inherit his Brother that is natural born, nor contrary, 1 Inst. 241. was an Act of Restitution; and Courtneyes Case supplyed this defect by express words, 1 Inst. 13. That H. is an Alien doth tantamount, as that he hath no blood, as the Lord claiming by Escheat where Natural Subject's Heir is an Alien, doth only say he died without Heir; locus nativitatis was not the sole Impediment of the Discent, but the want of heritable blood, neither of which is supplyed by removing the other defect, which is causa proxima, as by pardon of Attainder the blood is not restored to H. born before;

So

So where Father and Son are both Aliens, by Denization the defect of place is taken away, yet the Son shall not inherit, but the Lord by Escheat pro defectu hæredis: And this answers Godfry *against* Dixons Case, the Non-allegiance being only the disability; and the Acts take no notice either of the Parentage or Brotherhood, but leaveth that to the Construction of the Common Law, had they bæn named Brother, as the Lord Leicesters Case. Others might be Estopt to alledge the contrary, but not so by the finding of the Jury that they are Brothers, which on this Special Verdict is as void as if they had found the younger Brother Heir to the elder, which is the Case in question, and on which the Court are to Judge: So if they find Feme hath Issue A. and B. Brothers, and that A. is Heir to B. is not sufficient to make them so, unless the Father appear. 4. On the Relative Clause is made this Query at Common Law of Natural Subjects, who can no more inherit each other, or to the Father then where he is a Subject and they Aliens, Bract. 130. The Opinion of Cook in Hobbies Case hath bæn always received, Fleta 43. Brit. cap. 5. & Ratcliffs Case, 3 Co. 41. and in the same reason with Sons born after Attainder, which is that they never had any inheritable blood from the Father: In Godfreys Case the Father was Denizen, and so the Son, after naturalized, shall inherit to him: And as Shelleys Case, 1 Co. the elder Brother, so naturalized, shall enter on the younger if there be no restraint in the Act. Also in Hobbies Case, as Bract. 113. the blood of the Mother uncorrupted was sufficient to preserve a privity betwixt the Brother and Sister: Also it's sufficient for the Defendant to shew such disability, although the Plaintiff need not convey, as Mack-williams Case, Hub. 232. Coment Brother, 1 Inst. 239. 11 Co. Lord Delawares Case.

Twisden for the Plaintiff observed, that Patrick who claims through his Father Nich. cannot Inherit John, but yet the Issue of George may inherit his Father, being Naturalized, and he born in England, as born in England, they may inherit each other, though the Father be an Alien, but the Act of Naturalization doth not put them in any better condition. The Ground of all discents is love, but that love is engendred by Blood, Pl. Com. 445. yet must be pure and uncorrupt, as Pl. Com. 545. So Bastard, or Issue of persons Attainted, are poyson'd; and inheritable blood is no more then such a blood as the Law doth admit to inherit; so the Law makes the same blood in the same Man corrupt and uncorrupt: As if H. be seised of Lands, and also of foundership, as to the Lands, its corrupt, not so as to the other:

This

This blood is all over the World clear and pure, and they are Brothers every where, which was the reason of Sir Upwell Caroons Case; but in person Attainted, its part of the Judgment that the blood be corrupt; but in Aliens blood there is no crime, but only a weakness in defectu Allegeantiæ, which is only in the place; so in the same place, the Law makes difference, for Alien Amy may Traffick, but the Alien Enemy, like Dowmans Case, 9 Co. Cr. 476 Baker *against* Wills, or the Water of the Sea, whilst in the Ocean, its Salt, but when it runs through the Earth, its pure and sweet, Denizen, 7. the blood is not corrupt, nor so termed in any Book, but only by Similitude; as Entry into Religion, H. 7. the Brothers born in England shall be as Fresh-River, and have their blood Inheritable ex provisione legis. That Denizen Sons cannot inherit the Father, is, propter defectum, or imbecilitatem medicinæ, that only looking downwards, whereas an Act of Parliament works upward and downward, 1 Inst. 129. and removes the defect. Baron & Feme having Issue before Marriage, beyond Sea, and there Marry, and then Return, and such Issue is Naturalized, yet he shall not inherit; but yet ex operatione legis by their being born in England, they have an hereditary quality added to their blood, being born in England. Also the Conveyance need not be made higher then the first purchaser, and in that by nature he is Brother, the Law makes him Heir. Also the blood of the Father, however disabled or corrupted, Lit. Sect. 747. shall never hurt the Son, but where somewhat descends from the Father, (or where the Father might have by possibility inherited the first purchaser) as Dy. 274. Vivians Case, where the Uncle dyed seised, and the Father is Attainted, Edwards *against* Rogers 1 Cr. is a stronger case then this: The Attainder of the Eldest Son bars the Youngest, for that its a gift in Law made to the King, and none ever doubted, but the youngest Son by another Ventre should be bar'd by Bargain and Sale, or devise, by the Eldest, before Entry. The words of Bract. & Britton are only in decision of doubt that was then, whither Issue of person Attainted may inherit the Mother, which they hold he cannot; and Cook delivers no positive Opinion, but only some have said. And before Hobbyes Case it was doubted, whither Issue of person Attainted should inherit Collateral Ancester or his Brother. In Foster and Ramseyes Case B. R. it was resolved, they should inherit each other, where the Father is Alien: The Reasons of Cook for Godfryes Case are all against him, as the Father need have no inheritable blood, &c. nor hath the Father any by denization, as

to

to the Son that was born before. 2. Admit they cannot at Common Law, the Act doth not enable them to inherit one to the other, for that it must receive a Construction is Evident: For in the largness of the words, Heirs by several vertues may inherit, and Construction must be according to the intent, and that to be Judged by the wisest, such as have Plowdens Head, that gives this Rule, not by every Man: Also it cannot be intended as was to St. Paul, said by the Chief Captain, that an Adopted Son shall be prefer'd before the Natural, which is as the Elder to the Younger Son, Hub. Stukely *against* Butler, the whole intire Sentence must be taken together: Also the particular words of these particular clauses, are but a repitition of the General before, and therefore to be tied up unto them and guided by them.

Siderf. 164. pl. 21. The King *against* Wainwright and Jeoffryes. Ante.

Monday, No. 16.

SIR Jeffry Palmer the Kings Attorny, prayed Consultation to the Admiralty on exception of all Money growing due for any goods before mentioned, among which are Prize-Goods in the Act of Oblivion, and the Jurisdiction thereof since given to them by the King; but by Jones for the Defendant, the exception is only of the Fermors, and of such Moneys as were in their hands by their Sales, not of any Moneys of such Goods that were in the hands of other persons; but by the Explanatory Act, as Whethams Case in Exchequer, which giveth the Admiral Jurisdiction, the immediate buyer of such Goods was chargeable, but not any second or third hand, which Windham agréed; But Keeling conceived only Accomptants liable, where they had not discharged themselves, not any private persons. Hyde and Twisden accorded with Windham, the Defendants being immediate buyers, if they had paid their Money they are discharged, although the Receiver run away, but having not paid any Money, they are chargeable by the very Act of Indemnity, which excepts all Money due to publick use and unpaid: Also that the buyers of such Goods shall be accountable, cannot be intended of Collectors or Treasurers: Also the Treasurers are chargeable only for what they have received, but not for any Contract made, but he puts Money unpaid upon the buyer, and so is discharged against the King. Also here the sellers in the Admiralty are but as Bailiffs, and the contract is the States, and so such sellers have no remedy for such Moneys (80) Admiral.

Moneys, unless he pay the Money to the State. 2. Jones prayed, that seeing the denial of the Act of Oblivion pleaded in Admiralty was Suggested in the Prohibition, they might demur, or plead, and so this Court may determine the point: But the Court would not compel that, but unless cause be farther shewed, Consultation awarded. Sed Adjornatur.

The King *against* Keble and Savadg.

(81) Prohibition.

WIld prayed Prohibition to the Official of London, but the Court denyed it, on Suggestion that the Defendants were chosen Church-Wardens by the Major number of Inhabitants of the Parish, according to custom, in Anne Bl. fryers, which, by Hyde, is only Parochial since H. 8. but before was a Religious House, and therefore cannot prescribe. Also this choosing by all the Parish, is but an Opinion lately broacht to avoid the Act of 15 Car. 2. cap. 5. of Vestries, but is indeed but an Election by a select Vestry, thereby put down, and these were sued by those Elect, by the private Vestry, for the Key of the Church.

Hopkins *against* Stephens

(82) Trover.

TRover de quodam instrumento ferreo, Angl. a Vate-Horse (which in the West Country is a Frame to set a Wash-Tub or Vate upon) which in Kent is called a Stall or Stane-Horse; and by Jones, is good, there being no proper word, as in casu Morgan de instrumento, Angl. a Skreene.

Judgment for the Plaintiff per Curiam.

The King *against* Prin. Ante.

Tuesday, No. 17.

(83) Mandamus.

JOnes pro Rege, This Act is a general Law, of which the Court ought to take notice, in that it hath a general Influence on the most, or on all of one Genus, although 4 Co. 76. be more Scolastick, yet according to him, an Act concerning the Clergy is a General Law; so of this of Corporations, of which every Corporation is a Species, an Act concerning persons is but particular, but Yelverton 106. the Act of Nonresidence is a General Law, and 11 Ed. 4. 8. is express in the point of our Case. 2. Its not necessary to Return any Cause, in that the design of the Act is to enable them to do it without, and although the party should conform.

3. Here

3. Here needs no Summons, as generally where Corporations, as such, turn any out, must be given in that they cannot turn any out without Objecting some Cause, but the Commissioners may do it without any Cause; also these Commissioners were but hac vice, and transitory, and so not like a standing Judicatory, who may give reasonable time, as is necessary, ni every Summons, and against the intent of the Act. 4. He agréed, unless he were in possession of his Office, Dec 24. the Commissioners have no power; but this defect is supplied by other helps in the Return, it being said that the Commissioners, by virtue of the Act, and secundum Actum, which doth intend all necessary Circumstances incident, as Dy. 312. and in Return of Sheriffs that Men Return F. 80. were Summoned secundum exigentiam Brevis, is always held good, and if the Defendant were not in at the day he is not removed according to the Act, and so may, saving the Mayor hath undertaken such Return, have his Action for a false Return. But a full answer is that this Return is by a Stranger, the Mayor, and not by the Commissioners who were parties to the putting of him out: Also the Court may, notwithstanding the Commissions determined, send a Writ to them, to know for what cause they turn'd him out; which Keeling agréed, as Justice of Assize after his Commission determined, may certifie any thing before it ended: Also by Hyde, this being a General Law, the Mayor cannot put him out that is Established, in the place of him that is put out. Windham agréed it a general Law, being made for publick safety; but disallowed the exceptions of virtute Brevis, &c. as Thin *against* Thin, where the subject matter doth not warrant it. Twisden and all agréed, that the Mayor need not certifie the cause of his being turn'd out by the Commissioners, but yet they must shew he was person within their power, as they must whereever its but qualified; and default hereof is not cured by any general words of virtute Brevis; also the Mayor may omit it on purpose, by Hyde, which would be inconvenient if it should hurt: By Keeling such shall be expounded according to the general intent of the Act, as in 32 H. 8. 33. Dy. 219. and in 21 H. 8. cap. 15. Windham agréed that such in these Acts do refer to the mischief, but in this Act such referd to the Subject matter, which were such as were Officers 24 Dec. 1661. which Twisden agréed. Adjornatur.

The King *against* Patrick. Ante.

(84) Mandamus. The Return of Mandamus was of the particular Foundation, and the Statutes de pacificandis discordijs, and that because the Defendant had not appeald to the local Visitors appointed, Quæns Colledge cannot restore him: To which Masters excepted, that its not said that the Bishop of Ely, was loci illius Ordinarius, but only that the Will of Cambridge is within the Dioces of the Bishop of Ely; and there are many exempt places, as Arch-Deacon, and other Peculiars, which are Ordinaries. 2. As to the matter, its ill; the words of the Letters Patents 11 Co. 65. are affirmative, and so exclude not the Kings Jurisdiction, as Five Ports is privileged, but not from Mandamus, which is Breve Regium; this Grant is but as Grant of Cognizance of Pleas, 12 Ed. 4. 17. b. which exclude not this Court: Also a Foundation of a Colledge is but as every private Conveyance the manner of the making being in the Authors own power, but the exposition thereof is in this Court; also the proper work of Visitors is to reform personal excess only, not to decide matters of Freehold; and ad visitandum & commodum, must only refer to such excesses, being particular words, within general, as Althams Case, also as Lit. Sect. 137. although the King hath given many things Spiritual to the Ordinary, 1 Inst. 96. yet hath he reserved many as Spiritual to himself, Yelverton 60. Gair and Fairchild F. N. B. 48. A. 2 Inst. 492. and this Court are Judges of such things as are in their Jurisdiction, 3 Inst. 42. as of deposition of Abbot, Prohibition F. 21 & F. N. B. 41.139.51.80. Also this Colledge is no Spiritual Corporation, Dy. 255. 1 Co. Porters Case Finch. Ley Engl. 92. Also this Act of pronouncing him president is not Spiritual, no more then Induction of person; So Conyers Case Dy. but we cannot have Assize, being not sworn 14 Ass. 9. the Foundation ad orand. & studend. 1 Inst. 142. doth not make it Spiritual, in that all are bound to the first, and the second is uncertain, that an Appropriation cannot be made to a Lay-Corporation, but may be to a Colledge, is no Argument that its Spiritual, in that Appropriation may be to a Nunnery. And the case of Alden *against* Toller, 6 Car. was not adjudged. Mandamus's have been granted to restore Ushers, Schoolmasters, Churchwardens, and Parish Clerks. Bramston pro Rege, and Brian Senior Fellow, the Foundation is ad studend. & orand. Juxta Ordinationes to be made by the Evesque and Chancellor, and that every

very Fellow should within two years Regency enter into Orders; 1. Its a Spiritual Corporation, although the persons be Lay, as Knights Templers, Fleta 111. and Singing-men in Churches, who are capable of Tythes: And Abbots at first were Lay, Durenus de beneficijs, cap. 20. and so the end be Spiritual its sufficient; and although it be not said ad Studend. Theologiam, yet the intent is apparent they should do so, being to enter into Orders sub pœna Expulsionis: Also ad orand. is sufficient to make them Spiritual, as of Nuns, 1 Inst. 342. which can do nothing else. Linwood, 111. verbo Personis Ecclesiasticis, the Carthusians, 105. verbo Notabilis diversitas, the strictest Order among Papists, are only founded in this manner, ad studend. & orand. Also 3. Diocesis signifieth the Jurisdiction of the Bishop, and the Vice-Chancellor is intended Visitor in the Chancellors absence without any special Deputation: Also the right of Visitation is to depose, Linwood 115. 8 Ed. 3. 327. 10 Co. 31. Suttons Hospital, 8 Ass. 31. by Scroope, Covenyes Case, its intended that Assize lieth on Ouster made by a Stranger, without Visitation, Allen *against* Ash 13 Car. 1. the same with Huntlyes Case, the Court will not examine the cause of deprivation; also the Writ need not be answered, in that the Return is to the Jurisdiction. Twisden, What Corporation soever it be will not be material, but it will be hard to maintain they are Spiritual Corporations, any more then Lawyers, who come ad studend. & orand. Also, if there were no Visitors, yet the Law will create them: And in neither case, by Hyde, can any Man come hither per saltum: And it will shake the whole Government of Colledges, should we give any remedy here. Windham held, as in Dr. Witheringtons Case had been adjudged, that where there are Visitors, none can come hither per saltum: And in 8 Ass. 29. 31. notwithstanding a deprivation pleaded, the Plaintiff may pray the Assize at large super titulum; but if then the Assize find he was deprived, he must first recover his name before he can sue. Keeling contrà; that it can be no inconvenience for all to return hither; for had they any cause, it would be sufficient to set forth their particular Statutes; and that for breach of any of them, they removed him: Also all the Law is divided into Temporal and Ecclesiastick, and here is no pretense of suing in Spiritual Courts, but only to Visitors, which are set up as an intermediate Jurisdiction, from whom lieth no Appeal, which is derogatory to the Justice of the Nation: Every founder may make Laws, but the Common Law shall judge whither

they be broken, or not, else it would set up an uncontrolable Jurisdiction against the King, and would shew a fayler in him. Hyde conceived this of Visitors a Branch of Ecclesiastick Laws, as the Vice-Chancellors Court, which is a Peculiar, that partakes much less of either the Common Law or Ecclesiastick. Adjornatur.

Munday *against* Mills. Ante.

(85) Slander. THe Plaintiff prayed Nil capiat per Billam for expedition, seeing the Opinion of the Court, that the words were not Actionable, being not spoken of his Trade of Currier, nor directly refer to it, as Slapers Case Hill. 1655. Rot. 2552, C. B. the Case of Lime-burners; where the Defendant habens Colloquium de querente, and of burning Lime, said the Plaintiff was a Cheating Rogue, Cheating Knave, and a Devil.

In Dism. Br. 11. Took *against* Ledgierd.

(86) Tythes. THe Court refused to grant Prohibition on Suggestion of Modus to pay 4 s. for every days Plowing of Wheat, and 2 s. for every days Plowing of Barly, for the incertainty: But if the Modus had been so much for every days work, with Averment that its certainly known, and how much it contains, it might be. But by Hyde, Wheat could scarcely be so much worth, time out of mind.

King *against* Chedwicke. Ante.

Wednesday, No. 18.

(87) Perjury. THe Defendant in Indictment at Sessions in Middlesex, for taking away Goods, which on the Evidence appeared to be in a Trunk, and the Perjury is assign'd in swearing that the Trunk was taken away from J. S. Indicted, Innuendo the Trunk, with the Goods therein, were J. S. which after Verdict is good enough, although the Trunk is not exprest in the Indictment, nor that the Goods were in the Trunk, by Windham and Keeling; Twisden contrà, conceived this substance, and not to be intended without special Averment, that the Goods in the Trunk were the Goods in the Indictment, which Hyde agreed. Adjornatur.

Winchcomb

Winchcomb *against* Winchcomb.

ON Writ of Error brought by the Defendant on Judgment in Ejectment, the Plaintiff, Defendant in the Writ of Error, brings Scire facias Quare executionem non, to the intent the Defendant, Plaintiff in Error, might assign Errors; to which the Plaintiff in Error pleads, that the Defendant ought not to have Execution, because he is in possession already by Hab. fa. possessionem, which was only a new trick for delay, which, by Williams, is good enough, the Plaintiff being to have Execution; but per Curiam, its only a device, the Scire facias being only to the intent that the Defendant may assign Errors, and there can be no such Plea to it in stay or delay of Execution. (88) Error.

Dean and Chapter of Pauls *against* Capell.

WIlliams prayed special Bail on 3 Jac. 8. in Error on Judgment in Debt upon Bond, to pay such Sum and Sums of Money as shall be declared due by the Dean and Chapter on Audit of Accounts, which Keeling denied: But by Windham, where the condition is to pay so much Money as I shall disburse, its good, and by Hyde, the Defendant hath pleaded that nothing was declared due on just account, on which the Plaintiff took Issue, and by Verdict its found that the Dean and Chapter did declare 1800 l. due, and in this Case the Dean is made a Judge, and therefore the Defendant cannot give any Evidence, whither the account be just or not, and therefore now special Bail ought to be put in, which Twisden agreed; and it differs from the Case of Award of Mony, in that the Condition of Bond is only to perform that, not to pay the Money Awarded, and this Law was made to provide Security for the Plaintiff: And per Curiam, præter Keeling, special Bail was awarded. (89) Bail. Execution §. 5. March. 74. pl.

The King *against* Stephenson and Colegate. Siderf. 165. pl. 23.

Friday, No. 20.

WIld, the Kings Serjeant, prayed the Defendants (who were taken by an Excommunicato Capiend. and brought hither by Habeas Corpus,) might be discharged, for that the Writ was never brought out of Chancery, and recorded here, as it ought, before it be delivered to the Sheriff, by (90) Excommengements.

by 5 Eliz. cap. 23. Windham conceived that the Statute is only strengthening, not enacting, and therefore the Writ as, at Common Law, is good. Twisden contrà; because the Statute appoints a certain way, it cannot be varied from; which Keeling agreed: But the penalties in the Act do not incur, and therefore the party shall be put to avoid it by Plea, but only for the nine Causes: Hyde accorded with Windham, in that the Sheriff is not Fineable for not so Returning, the Court Baild them, as 2 Cr. 566. pl.

The King *against* Burgess. Ante.

(91) Force. The Court now held that 31 Eliz. cap. extends only to Forcible Deteiner, not to Forcible Entry; also the Indictment is found 30 Maij, the force was 11th of May before, and the quiet possession is pleaded three years possession, prox. Ante 11 May, and a prædict. 11 to 30 Maij, whereas the three years possession must be until the Enquisition found: Also by Twisden, he that enters with force doth imply he was out of possession, and so cannot plead he was three years in possession, Dy. 141. a. new Entry cannot unite his auncient right to possession, but the Defendant having had several Verdicts, and quiet possession, the Court ordered the Plaintiff, to waive his Demurrer, and accept Plea de novo, Dy. 122. it being by Hyde, in the discretion of the Court to grant Restitution, or not, according as the Title appeared; and so hath been the constant Opinion of all my time: The Court refused to grant Restitution to the Plaintiff, but offer'd to take a Writ of Restitution, and execute it according to Verdict next Assize.

Siderf. 165. pl. 24. Hall and Uppington *against* Norwood. Ante.

(92) Partition. Witherington opposed the Prohibition to the five Ports in Suit in Dover Hundred Court there, for partition betwixt Tenants in Common, this being the same Suggestion as heretofore was in C. B. to the plaint; and on debate the Court thought fit to let the Woman Defendant here proceed in the Court below; also after Sentence and Partition there made, this Prohibition cometh now too late to be prayed here. Wild, the Kings Serjeant, this Writ betwixt such Tenants, lieth not at Common Law, and by 32 H. 8. the Writ must Issue out of the Chancery, and the Suit is there by plaint; but, by Hyde and Windham, that Court had Plea of Land and Partition between perceners, and therefore having

ving capacity to hold Plea of the Writ, this Judgment betwixt Tenants in Common is only Erroneous; but Keeling totis veribus for the Prohibition, in regard by Magna Charta no Freehold can be questioned by Plaint. But this Court had a Writ of partition before the Statute, by Witherington, as 22 Ed. 4. 23. 14 H. 4. 20. and B. R. Premunire, 15. and the Statute 32 H. 8. is only affirmative, and so Elegit given by Westm. 2 Hub. 148. Coxe *against* Bransley, doth lye in Auncient demean, and such Tenant may sue in nature of Assize; and the Statute never intended that Tenants in common should ever make any partition where breve Regis non currit, if before the Statute there were partition there by custom: But by Wild, the Action below is quare partitio non, secundum formam statuti, which per Curiam, is but erronious: And by Windham, where ever the Statute giveth remedy de novo for the same thing, whereof Inferior Court had Cognizance, they may proceed on Statute, and the Court may Award Prohibition, or any such Mandatory Writs, but would not, it being now too late after Execution, although after Sentence they may.

Davie *against* Isaake.

H. Covenanted to levy a Fine to the use of J. S. for Life of a Rent by 24 Dec. and that Conusee on default of payment may distrain; the Fine was not levied till after the day, and yet the Defendant now avowed for the Rent in Replevin, and on nient seisie in Fee, found for the Defendant, Stroud moved for Judgment for the Plaintiff, in that the distress is given by the Deed of Covenant, which is not pursued: But, per Curiam, the Fine may be averr'd to the uses of the Deed, although not levied by the time, and Distress is incident by Statute, although the Covenant were not. (93) Fines. 2 Roll. 13. pl. 3 Cr 510. Vaughan 40. 43.

Judgment for the Defendant.

Wheatly *against* Thomas. Ante.

Saturday, Novemb. 21.

Glyn for the Plaintiff, George Lord Cobham had a Brother Tho. Br. and eight Sons and two Daughters, and being seised of the Soccage Lands in question, &c. he deviseth to his eldest Son William for Life, Remainder to the first Son, and the Heirs Males, and so to the rest, Remainder to the Daughters in the same manner, Remainder to his Brother Tho. (94) Patents.

Tho. And in default of Males, to William the eldest Son, and the Heirs general of his body, and so to the rest of the Sons, the Remainder to Ed. a younger Son in Fée. William was seised, and had Issue Henry and George, and dyed seised; then H. and G. are attainted 1 Jac. and so attainted in 3 Jac. there was an Act made on which the Question groweth, which recites their Attainder and the Execution of George, and enacts That they forfeit to the King all their Lands, and that the King should enjoy only against them and their Heirs, and all claiming under them, saving the Rights of others, and Leases made by the Crown; and also saving several Grants made to others, provided that the Manor of Cooling, being the Lands in question, shall be and remain, and be enjoyed by Duke and Charles, and Calisthenes and John Brooke, and the Heirs Males of his body: And in default of such Issue to William the eldest Son of George and his Heirs, and in default of such Issue, to the Heirs Males of the body of George, &c. and on default of such Issue to and for such Estates Tayl, and such other Estates as were limited by the Will of old George Lord Cobham, and according to the intent thereof, notwithstanding any Fine by any claiming as Patentées, &c. The Jury find also the Stat. 7 Jac. that restoreth William Brooke in blood, the Son of George that was attainted, to Lineal and Collateral Auncestors, as if no Attainder had ever béen: Then Henry Lord Cobham the elder Brother being alive, died after 17 Jac. after which William died, and so all the Brothers and Sisters are dead without Issue Male; after which Francis the Lessor of the Plaintiff entred, and made the Lease, &c. The sole Question is, Whether by the meaning of 3 Jac. the Daughters of William the Son of George, who was Son of William Son of old George Lord Cobham, who are yet alive, be inabled to inherit, the Males being spent; which, had there béen no Attainder, is indisputable. And it's admitted also, had the Attainder béen in force, and no Act made they could not inherit: But this reference of the Act of 3 Jac. to the Will, is as much as if the Will had béen recited in hæc verba, which appears at large by the Abbot de Strata Marcella's Case, & 8 Co. 29. & 2 Co. 46. So Pridle *against* Nappers Case, 11 Co. 14. and Molineux's Case, 2 Cr. 144. Avowry 129. And supposing the Case such, the express words of the Act are, That the Females should take according to the Will; and the intent of the Act is the same as of the Will, otherways that Clause of the Act is wholly void: For by Attainder of H. and G. the Remainder to the other Brothers are not toucht, but only the three Estates in them: And as Holland *against* Fisher in C.B.

all

all the Court agreed, that the next in Remainder after them may enter on the Crown, which was also agreed in the Lord Dacres Case in the Exchequer: And hence it follows, that by this Clause, after the death of the five Brothers, it shall go according to the Will, cannot operate to save their Remainders which were saved before, but only to help the Posterity of the persons attainted; and they had a favourable aspect to them by name, in that after Duke, who was dead, they prefer William the eldest Son of George before the Sons of H. which were Charles or Calisthenes, &c. Also the Act hath inserted the Clause of perpetuity which was in the Will, and conceived then before Mildmayes Case to be good; the Objection that Henry, for whom this Act hath no kindness, should take by the Will if he survived the Fine named in the Act 3 Jac. is only suppositive; for they that had kindness for George who was executed, cannot be intended but that they had so to Henry; but yet they did not intend that Henry in person should enjoy it, but his Issue they did. 2. That here is a Corruption of blood by Attainder, which by Rules of Law hinders the taking by the Issue of George, and that the Will must ensue those Rules doth not hinder their taking by this Act, which as every Gift must be intended to remove every Impediment that hinders the Donées taking, as 3 Co. 86. So Hub. 234. Darcy *against* Ascue, Grant F. 41. and also all disabilities in the person wherever, it is in the power of the Donor to remove them, as Grant to a Villain by the Lord that is a common person; contrà of the King; his Grant cannot inure to two intents, yet if he grants probis hominibus de Islington, 7 Ed. 4. 14. pl. 7. Villinage 42. 2 H. 7. 13. pl. 16. it makes them a Corporation, in regard he is able to capacitate them. And in the Princes Case, there is no such Charter in Law, but yet being by Act of Parliament, all defects of Law are supplyed by the intent of the Act; and though the blood be not hereby wholly restored, yet according to the Rules of Law, it may qualifie the Heir as to this purpose to take this Estate given, Litt. Sect. 22. Formedon, F. 64. and in 7 Co. Nevills Case 33. it's true the Remainder limited to the Heir of such, is not good; but here the Heir shall come in quasi per discent, not by purchase, 8 Co. 166. 2 Inst. 334. Formedon 36. At Common Law the Issue of a person attainted should not inherit; but by W. 2. before 26 H. 8. he should inherit an Estate Tayl, 7 Co. 33. Nevills Case, 1 Inst. 391. Sect. 746. Because the Statute saith voluntas Donatoris de cetero observetur, yet it mentioneth nothing of Attainder, 5 Ed. 3. 14. by Herle, who lived when the Stat. W. 2. was made, and said the intent of it was to preserve

Inheritances; and in all Circumstances this Exposition falls pat on our Act of 3 Jac. which is stronger then W. 2. in that it takes particular notice of the Attainder, and yet limits it according to the Will: And it is to be taken beneficially to the Issue of G. being in nature of a Restitution, an Act of Mercy and Indulgence to the innocent Children of nocent Parents. Also the Act of 7 Jac. were the same men prorogued, who knew their former intent; and they restore William, the Son of George, wholly in blood, which shewed their pity of the Posterity of George, and the continuance of their affection to them: And although Remainder to the Heir of J. S. be void, where there is no J. S. at the time, yet 9 H. 6. 20. Remainder to a Corporation that hath inception, is good: So devise to Infant in Ventre sa Feme, or to the Heir of J. S. is good Remainder to Heir born after; so to the Heir of person attainted, as here.

Finch for the Defendant, The only Question is, Whether Remainder to the Heirs general of the body of old William Lord Cobham be so revested, and put into the old course of Discent, that it would have been in, had there been no Attainder, which I conceive it doth not, although the Males of the Lessor of the Plaintiff might have inherited by the Act of 3 Jac. and the Statute of 7 Jac. works nothing in this Case, in that William the Father of the Lessor of the Plaintiff is thereby only restored against the Attainder of George, not of Henry. Also there is a Special Proviso, That he shall have no benefit of any of the Estates of Henry that was attainted, but William had a right by the Act of 3 Jac. in this Manor which was necessarily saved by 7 Jac. Henry being then alive, the saving of his Remainder would be illusory and flattering: The weight of the Question lyeth on 3 Jac. and the words of reference to the Will therein, which neither in Justice nor Equity can be construed to set up the Remainder according to the Will, neither by way of Creation of new Estates, nor by way of Reviver of the old Estate forfeited, for then the Heir of the body of William would take by purchase, which is Henry, who is person attainted and incapable: And although there be five precedent Estates limited in the Act of 3 Jac. yet the old Remainder, if revived, must radically first vest in Henry, for whom it's confest the Act had no favour, but only for his Issue, and this is impossible to be done by these words of reference: Every private Act as Altonwoods Case, 1 Co. 47. is to be expounded as a private Conveyance, and giveth no more then the person to whom it's given can take or keep, only it's a better assurance, but yet it's guided by the same Rules of Law,

and

and such Estates Tayl as are dockable by Common Recovery: also it's the King who had this Remainder by Attainder of Henry, so he is the Donor, though the Estate be conveyed by Act of Parliament; person attainted, where the King is Donor, hath no capacity of taking or keeping, else the Grant would work to two intents, of Pardon and Restitution. I agree that Villain shall hold by Gift of the Lord, but the exposition of such Infranchisements is favourable, but not so of persons attainted; also Grant probis hominibus de D. is for the Kings benefit, and if he release the Rent, the Corporation is ipso facto void, as Dyer so not like our Case. This Act cannot be construed to create a Contingent Remainder, in regard they are as full for a present Remainder as can be; and it would be a violent Exposition that such Remainder should be suspended till Henry and his Posterity be extinct: But however, as 1 Inst. 3. b. such Contingent would be void as to the Issue of J. S. where Bastard eigne hath Issue, in regard there was an utter disability at first: Also this Act is not quasi a Restitution, but sets up the Estates in the Will, only subject to the Rules of Law; for the King had granted to Duke Brooke so long as Henry had Issue of his body, which was confirmed in the same Act, and would be defeated should this Act work in nature of a Restitution. Also such construction would confound the method of the Act it self, as well as of the Will, for of necessary consequence H. would take before William, although not named at all in the Act; and William, who was named in the Act to take first, shall take last: Also H. is not restrained to Alien, as all those are to whom any Estates are limited; 7 H. 4. 18. b. pl. 23. all are but one Estate in the King: Also a Restitution to blood without Lands is frequent, but never was President of Restitution to Lands without Restitution in blood; and as Hub. in Ratcliffs Case, the Stat. W. 2. neque per Fait neque per Feoffment was never intended by Ed. 1. the Lords should not forfeit by Treason; this was but a violent construction gained by time, and restored to the Crown by 26 H. 8. and if Henry cannot hold it, his Issue cannot have it: Nor can general words restore any ad liberam Legem, as Sir Walter Raleighs Case, without express words: and although the two Houses prepare the Act, yet its the King makes it and stamps it, who can never be intended to make such Restitution: But the intent of the Act was first to establish the Parents of Duke Brooke and Charles, and to graft on the new Stocks he had named, and after that currat Lex. The King did not intend to work any Estates out of himself by confirmation of a Will, which cannot add any dis-

cendible quality, 9 Co. Beamonds Case, & 9 H. 6. 9. to an Estate not in the person before, although the Estates should be set up: But the Act only signifieth that as much use may be made of the Will as if the Act had never been made. In the Case in the Court of Wards, 9 Car. of Sir H. Pope Bland, this very point of Reference of an Act was resolved, and the Lands enjoyed so at this day, where there was a private Act of Settlement of D. provided that the Manor of S. should go according to the Uses mentioned in the Indentures, which by advice of Bramston and Bridgman, doth make no more then the Uses shall go as if no Act had been made. Adjornatur.

Siderf. 168. pl. 29. Sir Charles Sydlyes Case. Ante.

(95) Peace. HE was Fined 2000 Mark, committed without Bail for a week, and bound to his good behaviour for a year, on his Confession of Information against him, for shewing himself naked in a Balkony, and throwing down Bottles (pist in) vi & armis among the people in Covent Garden, contrà pacem, and to the Scandal of the Government.

Discontinuance Br. 32. Lloyd *against* Pollard.

Monday, No. 23.

(96) Tail. TEnant in Tail of the Kings Gift, the Reversion in the King, Bargains and sells to J. S. who levies a Fine, and five years passed, then he dyeth, and five years more passeth, which by Wild, the Kings Serjeant for the Defendant, in Ejectment in Evidence to the Jury, doth Bar the Issue for his Life, although it doth not hurt the Issue of such Issue, nor prejudice the Crown: But, by Twisden and Hyde, this is no Bar to the Issue, nor to the Issue of Issue, contrà if such gift had been of the Creation of a common person. 2. The Plaintiff proves an entry within five years by these words, I claim these Lands on behalf of the Countess of Peterborough, lessor of the Plaintiff, having only paroll command from her Agents, which the Court conceived sufficient to support an Estate against a Bar by Fine or Recovery of such Tenant in Tail; contrà if the Defendant had set up any other Title. 3. It was agreed that entry by Estranger is sufficient, so the Cestui que use assent within five years after the Entry, as Wallops Case: and, per Curiam,

Curiam, the subsequent Entry of Cestui que use is a good Evidence of such assent, so is here. Declaration of her assent, which may be made seven years, or at any time after.

The King *against* Thomas.

THe Defendant and others were Indicted at Hereford, of a Murder done in Glamorgan, before Judge Hyde. The Defendant pleads former Indictment at the Grand Sessions in the County of Glamorgan, and acquittal there: To which the Plaintiff replied, that the fact was done at Kavenheregood which is within the Jurisdiction of the Marcher, and that by those Statutes, 26 H. 8. and 27 H. 8. and 34 H. 8. he is indictable in the next adjacent County. Williams for the Defendant, who demurr'd on the Replication, conceived that at common Law he cannot be tried out of the County, nor after acquittal. But the question is on those Statutes, of which 26 H. 8. is the principal, which is for spædy punishment of all Murders committed within the Dominions of any Marchers; and in another Clause, that notwithstanding an acquittal in any of the Dominions of the Lords Marchers, they may be tried in the next English County. And I admit it thus far, that any Felony committed within Marches, and tried in any Court of the Lords Marchers, its triable in the next English County; but this Statute never intended to extend to other acquittal, then such as were in the proper Courts of the Lords Marchers; not to any acquittal in the Grand Sessions, The Reason of the Law being for speedy, and legal course, among the Lords Marchers, it doth not at all touch Wales, who had a Legal way of procæding in their Great Sessions before, as appears by 27 H. 8. the Original of the Marchers being by particular grant to Lords, on the Conquest, to rule at their discretion, before Wales were fully subdued, Cr. 261. Perimans Case they proceeded by sir. Nor doth the Statute of Rutland, made for Wales, at all touch the Marchers, but they procæded ad libitum; but since the Statute of 27 H. 8. their Counties are divided into English and Welsh, and peculiar Jurisdiction given to them, and this Glamorgan is made a new County: And the Parliament did only intend to regulate their procæding according to Common Law, all which I learnd out of Jones his Argument of Sandly and Prices Case 7 Car. Transcribed by his Son. 2. An acquittal in the Grand Sessions, is no acquittal in the Court of any Lord Marchers, as (97) Coron. Wales §. 109.

as the Letter of the Law of 26 H. 8. is, there being no such Court as the Grand Sessions within the Lordships Marchers, no more then acquittal in Monmoth before the Judges of Assize, Monmoth being wholly within the Lordships Marchers: So of several places in Glocester; and the same of Shropshire, &c. made English Counties. Also this Great Sessions is Constituted by 34 H. 8. 26. afterwards, which as to Denby, Mountgomery, and Glamorgan, is introductive of a new Law, but not so in auncient Counties: And the Proviso of this Act, which leaves Murders or Felonies to be proceeded against in the next County, was only to continue the auncient liberty given by 26 H. 8. that if such as commit Felony were tryed in the Court of Marchers, they may be tryed in the next County, but not such as were tryed in the Sessions. And all these Statutes have, on all occasions, been taken strictly, as in the former Case of Sandly *against* Price, 1 Cr. 1. where after three Arguments of a side, per totam Curiam, adjudged no Appeal would lye; so Cheedle's Case, 1 Cr. a Certiorari was granted, and the party tried in his proper County; and since 26 H. 8. not one person hath been questioned on it. Winnington pro Rege, The General Jurisdiction of Wales ensued the Government of England, as 3 Ed. 3. 9. and 24 Ed. 3. 23. and by Doderidge 36. these Marchers were set up to preserve the Conquest; and there are other places in Wales, where an after-Trial may be in the next English County, on 26 H. 8. and therefore the Trials run, as to the locality whereever the Lords Marchers had Jurisdiction, not to Trials in their Courts only, which yet were according to the Laws of England: And the inconvenience of the Law was, foul Trials were usual, by reason of partial Juries by that Pais where the Marchers were, so related and united in friendships, and this was intended to be remedied: Also the time is limited unto two years to proceed in the English County next after the acquittal; and 27 H. 8. doth make Glamorgan a new County, which proves that it was parcel of Marchers before, not Welsh, Poult. 614. the Proviso of 34 H. 8. includes all in the former Acts that refer to any Trial in Wales, as well to acquittal as suit; and all Fines for Murders formerly: Uses are expresly taken away, which implieth that this Clause and Proviso of acquittal doth still remain, Poult. 776. every other Clause being Re-enacted. Windham conceived the difference betwixt the Trial left to the next English County, and the Retrial after acquittal, and Williams agreed, and by Keeling, 34 H 8. recites only the Clause of acquittal; but only 26 H. 8. its enacted at which

19 H. 6. 12. pl. 31.

time

time there were Marchers Court, which were dissolved by 27 H. 8. Hyde according to Twisden, that 34 H. 8. only continueth the Trial in English County, not to continue the pleading of acquittal. Adjornatur.

The King *against* Nelms's Case.

THe Bayliff on Arrest by Bill of Middlesex, claims 1 s. 8 d. and if special Bayl Bond be given 2 s. 4 d. But by Hyde & Curiam, the Fees are to be paid by him that sets them on work, not by the Prisoner; of whom the Defendant having taken 7 s. for Attorneys Fees, was convicted of Extortion. (98) Fees.

Wilcox *against* Peacock.

IN Assumpsit against three, one confesseth the Action, and a Venire facias goeth as well ad triand. exitum, as to assess Damages: The Jury find generally for the Plaintiff on Not Guilty pleaded, or Non Assumpsit by the other two, intending to find only against him that confessed, which by Hyde Chief Justice, is good against all, they having distinct directions as to each; and had they found for the Defendant, yet they must assess Damages against him that confesseth, although the Contract be joynt, which the Court agreed, and it's all one in Trespass: And although Wild, the King's Serjeant, offered the intent of the Jury under their hands, yet the Court refused to grant new Trial, præter Keeling, who doubted, that if the two had been found Not Guilty, here is now no Assumpsit in the third, and so no Damages can be assess on his Confession, but ordered the Plaintiff to shew cause why he should not assent to it, the Verdict being hard. (99) Joinder.

The King *against* Mills.

Tuesday, Novemb. 24.

ON Mandamus to the Mayor and Aldermen of the City of Canterbury, to restore the Defendant to his preheminence; The Return is by the Mayor, Alderman, and Common Council, which, per Curiam, is well enough; so by Keeling, is any Return by the right name on a Writ directed to them by a wrong name: Also the Return was, that by Custom they may Elect de novo on voluntary Recess, and that the Defendant did voluntarily recede, and petitioned to be discharged, (100) Mandamus.

charged, which they did, and after he was elected de novo, which was good per Curiam.

The King *against* Wainright and Jeoffryes. Ante.

(101) Admiral.

Goodrick opposed a Consultation to the Admiralty, in that the Defendants were not accomptable within the Act of Oblivion, and the Act for the Admirals Jurisdiction doth not make them so, nor 6 Co. 13. revive any proceeding there; (Ellis) ad idem, That the Defendants are pardoned by the body of the Act, and not excepted in any Clause; and the latter Act doth falsly recite that all Prize Goods are excepted for only those in the hands of Fermors, Accomptants, &c. and they are but general words affirmative, 11 Co. 63. Fosters Case, which doth not take away the force of the precedent Act of Parliament. Also this Court hath on this ground granted a Prohibition before the Act for the Admiralty, which being well granted, this Act looks only forward, and so although it do except them, yet no Consultation can be awarded. Keeling conceived these Goods excepted by the Act of Oblivion, and so Consulto revocabimus quod consulto fecimus, without regard to subsequent acts, and the buyers are receivers within the Act of pardon, unless it appear they have paid for them. Also the Act of Judicial Proceedings had confirmed Judgment in Dower given here, without being subject to a Writ of Error; And by Windham, Sale of Goods is only applyed to prize Goods, not to any Sequestrations, &c. These came in Mony to them, but the Prize Goods came in specie to the Treasurers subject to Sale: Also there is a Sentence, and Burtons Case hath been frequently denied before the Act of Pardon, which the subsequent Acts intend to strengthen, Dyer. Twisden ad idem, The Defendants are Receivers within the words and meaning of the Act of Pardon, as Debtee Executors of Debtor, is quoad every other Estranger Creditor: But he agreed that Action upon the Case on Assumpsit made at Land, had not been confirmed by the Act of Judicial Proceedings, but only such Causes of which Usurped Powers had given them any Jurisdiction. Hyde ad idem. And Consultation granted per Curiam.

The

Siderf. 169 pl. 30. The King and Mr. Middleton's Case.

MR. Attorney prayed a Mandamus to restore him, being chosen Treasurer to the Corporation of the New River, which the Court doubted, being no publick Corporation for Government; so in the Case of Cooke Clerk of the Water-works in London; so to restore a Member of the Physicians; all which are but private Corporations for Commerce, established by a private Act of Parliament. Keeling contrà; that this Court may grant a Mandamus to any private Corporation, where a person hath Freehold, as well as for Parish Clerk, or Fellow of a College. Post 629. pl. 114. Adjornatur. (102) Corporation.

Siderf. 167. pl. 26. Palmer *against* Fleshier. Ante.

Hill. 14 & 15 Car. 2. Rot. 283.

IN Action upon the Case, the Plaintiff counted that W. Wheeler was seised within six years of a Messuage and a piece of Ground adjoyning, and in the Messuage had three Lights, which he let with the Messuage to the Plaintiff for years, and after grants away the Land adjoyning, which the Grantee or Estranger hath stopt the Lights, which is found by Special Verdict on Not Guilty. And by Jones for the Plaintiff, on the reason of Robins's Case, Hub. 131. although the House be not ancient, yet being granted with the Lights, any claiming under the Grantor cannot stop them, which Windham agreed, the Lights being now parcel of the House; as a Mill to which a Current is newly made, granted away, doth include the Current without any words of cum pertinentiis, being an essential part of the thing: So Clerks Case, 1 Cr. 170. where things are of necessity, as Water, Air, &c. Keeling is not satisfied, in that there is no mischief by such Building, in that the Grantor might have provided against the stopping them: 7 Car. It was adjudged that two having Ground adjoyning, the one built de novo, and the other in his Ground digg'd so near, that the other fell, and no remedy, the House being new. Also the Grantors Lease or Interest cannot prejudice the power or Liberty of the Grantee. Things ancient, that have Existence, as Sury *against* Pigot, 1 Cr. are not extinct by unity; and so conceived the Plaintiff ought not to have Judgment: Twisden accorded with Windham, That the Grantor shall not derogate from his own Grant; although I agree, that he that hath Ground adjoyning may build, being a Stranger, (103) Nusance. 3 Cr. 269. pl. 10.

which Windham agreed, as Keeling cited; but in this Case he that erected the House was Owner of the Ground, and so none under him may build, as was agreed on motion in Arrest of Judgment of Houses in Shoe-lane: But Hyde absente

Adjornatur.

The King *against* Ricard.

(104) Market Overt. The Town of Monmouth claimed Fairs by Patent infrà quinque milliaria & circuitu ejusdem Villæ, The new Patentee pro Rege in Scire facias claiming another Fair, saith that the Grant by Ed. 6. was of all Fairs infrà 5 milliaria Burgi de M. & in circuitu ejusdem, Dyer 342. cited in 5 Co. Edens Case, absque hoc, that the King granted all Fairs infrà 5 mil. Burgi de M. & circuitu ejusdem, which Issue tried per Pais, and found pro Rege. Jones in arrest of Judgment, conceived it ill, this being matter of Record; but he agreed Non concessit generally a good Plea, 1 Inst. 260. But this is on a point on which no other Evidence can be then a Copy of the Patent enrolled. But by Twisden, this point of the Writ may be specially traversed by Inducement, as here, as well as general pleading Non concessit, which was agreed by Windham; and the Non concessit generally is rather the stronger Case against such Trial, than this special Non concessit; for now the Jury shall take notice what is the inside, and what the circuit of the Town, and how it's limited, which is proper matter of fact, and well tried: Keeling according, as Grant cum advocatione of the Manor of D. and the Defendant confessed the Grant of the Manor absque hoc, that he granted the Advowson, and good. Also the Circuit of the Town is all it's Liberties, which may be much larger than the Walls.

Judgment for the Plaintiff, Nisi.

Gwin *against* Win. Ante.

(105) Error. The Record being now removed, it appeared to be quod Demandans teneat, which Williams prayed might be here amended, in that it appears the Verdict was for the Plaintiff, and only the Judgment mistaken, which the Court refused, but reverst the Judgment.

Foster

In Debt, Br. 79. Foſter *againſt* Holyman. Ante.

THe Defendant promiſed, that if the Plaintiff do agree with J.S. for the price of a Horſe, on Communication of the Sale betwixt J.S. and the Plaintiff, That if J.S. did not pay, the Defendant would, which per Curiam, (it being aſſigned for Error after Verdict, and Judgment in the Palace Court at Weſtminſter) is good enough, in that unleſs the Defendant had not promiſed, no Sale had been made; and it's all one, as if he had ſaid, If the Plaintiff will agree, the Defendant will pay, &c. Judgment affirmed. (106) Aſſumpſit.

Leaper *againſt* Booth.

SPecial Verdict found that Surrender was made by A. to the uſe of B. and his Heirs, to the uſe of ſuch perſon as A. ſhould name by his laſt Will, this by Twiſden is ill, in that no Uſe can be on a Uſe, although being Copyhold it be not executed by Statute: But the Verdict finding further, that H. nominated by the laſt Will of A. had ſurrendred unto B. the Court conceived no doubt in the Caſe. Judgment for the Plaintiff, Niſi. (107) Surrender.

Smyth *againſt* Drinkwater.

Wedneſday, Novemb. 25.

JOnes moved in arreſt of Judgment in Action upon the Caſe for falſly, and by conſpiracy, making Oath before a Maſter of Chancery, and farther petitioning the Cuſtomers, per quod the Plaintiff was then for that cauſe diſcharged of his Office, in that if the Maſter have Authority to take ſuch an Oath, it's but Evidence, which being falſe, no Action upon the Caſe lyeth; and if the Maſter hath no Juriſdiction, then an Action upon the Caſe lyeth; but the Plaintiff ought to aver that the Maſter hath no Juriſdiction: But per Curiam, it ſhall be intended he hath none, and ſo the words are actionable. Judgment for the Plaintiff. (108) Conſpiracy.

In Deviſe, Br. 6. Hooks *againſt* Bellamy. Ante.

(109) Ejectment. Infant cannot aſſent.

IN Ejectment of Lands in Aſcrick, the Special Verdict finds demiſe of Lands in Aſcough, which, per Curiam, is good, being ſaid per nomen of Eſcrick: The Leſſee for 2000 years deviſeth to Feme for Life, Remainder to Martyn for the reſidue, Martyn in the life time of Feme leaſeth by Indenture for 1000 years to C. whoſe Adminiſtrator B. is Leſſor of the Plaintiff. And by Powis for the Plaintiff, 4 Co. 66. 10 Co. Lampets Caſe, this is good by Eſtople; alſo the Feme was made Executor unto the Deviſor, and entred generally; and after aſſignment by the Remainder, ſhe aſſents and dyes, leaving the Defendant her Husband Adminiſtrator, who is Ejector, and as 3 Cr. 719. Price *againſt* Symſon, ſhe may aſſent to this Legacy, although ſhe were Covert, ſo there be aſſets, which muſt be preſumed, as well as Infant, as Ruſſels Caſe. The Court conceived the point of Eſtople out of Doors, and that the primer poſſeſſion is good where neither party hath Title; and the ſole point is on the aſſent, whether being by Feme Covert, it be ſufficient. Adjornatur.

Her payment of Legacy of mony deviſed to a perſon, adjudged good. 7 H. 4. 13. b. pl. 10. In Executor, Br. 47. She may grant, but cannot releaſe. 21 Ed. 4. 24 b. pl. 12. per Littleton.

Siderf 167 pl. 27. Tooms *againſt* Etherington.

(110) Coron.

THe Plaintiff, Adminiſtrator of T. brought Scire facias on Judgment on Bond againſt the Defendant, who pleaded that the Teſtator T. became Felo de ſe, of which there is Inquiſition found the ſame day: To which the Plaintiff replys by the Act of Oblivion at large, and that he was not a perſon excepted: To which the Defendant demurrs. Newdigate for the Plaintiff, This Plea is not ſufficient to diſcharge the Defendant, in that the King hath no Title but by this Inquiſition, which is void, and not made good by the Act of Judicial Proceedings, in that then the King had but inception of Title, which was before pardoned by the Act of Oblivion: But per Curiam, Hyde abſente, the Coroner is choſen by the County, and he ceaſeth not by change of Government, and ſo his Enquiſition is good, and the Kings Intereſt is not gone by after-Pardon without ſpecial words of Grant, in that the poſſeſſion of all tranſitory things are by ſuch Office actually in the Crown; ſo of things in action; and this is a good Bar pleaded by the Obligor himſelf, as well as Utlary: But by Twſden, Wares or ſuch Chattels that are derived out of anothers Freehold, are not in the King till Office.

Office. Judgment for the Defendant. But whether Execution ſhall be awarded pro Rege, Adjornatur.

King *againſt* Gaſt or Garth.

THe Defendant was Indicted for uſurious lending 20 s. ea intentione to receive 23 s. within a Month, and that the Defendant did receive 3 s. for the Loan of the 20 s. which, per Curiam, is not good, without ſaying quod corrupte aggreatum fuit, & ea de cauſa ex motione Hoskins, it was quaſht, being removed out of Inferior Court. (111) Uſury.

The King *againſt* Farre.

Thurſday, No. 26.

IN Indictments here, in regard the Court takes the Grand Juries Preſentments, the entry is only quod per ſacramentum 12 extitit præſent. without ſaying probos & legales homines, or quod Juratores onerat. & Jurati dicunt, or præſentant; But in all Inferior Courts which are removed hither, it is Juratores præſentant, & overati, & Jurati, & per Sacrament. 12. probos & legales, &c. which difference was agreed per Curiam, and the Clerks of the Crown ſide: And theſe exceptions being taken by Newdigate in Arreſt of Judgment, were all over-ruled in Indictment before the Grand Jury of Middleſex of Forgery. (112) Enqueſt.

OF a Juſtice of Peace, that he is a Logger-headed and a Sloutch-headed Burſen bellied Hound, is no cauſe of Indictment before Juſtices of Peace in their Seſſions; partly for want of Juriſdiction, partly becauſe the words are not Actionable: And after Judgment, this was by Jones aſſigned for Error. Adjornatur. (113) Slander.

The King and Middleton *againſt* Corporation of the New-River Water. Ante 625. pl. 100.

BAldwin oppoſed the Mandamus, becauſe according to their Patent of Corporation, by King James, they had in a full Court, the Tueſday after All-Saints, elected another: Alſo by Coleman, there muſt be ſome Rule to ſir the Judgment of the Court in granting theſe Writs, as becauſe it concerns Adminiſtrators of Juſtice, as Leet; but it hath been denied to Court Baron; Or, becauſe it concerns any publick (114) Corporation.

publick Administration. Also the Court may as well send Mandamus to admit one in the Corporation of Mercers. Maynard for the Plaintiff, The only question is, whither Restitution, which is not voluntary, be justly demanded, or not: To which I always observe the difference, whither the Office be only at will, in which case they will not grant it; but whereever the party hath a Freehold, although no benefit by it, the Court will grant it, as to Fellow of a Colledge in Dr. Witheringtons Case, who hath a fixed Estate, and no more for Government then Town-Clerks which, as Audlyes Case, and the Town of Bostons Clerks Case, who was chosen Alderman to void his place: And all these are of less Government then our Case at Bar, where the party hath doubtless wrong done, contrary to the Kings Patent, which unless this Writ go, is remediless; and Quo Warranto lieth to Repeal this Charter, and so every Member of it should be of the same publick nature; and an Apostata Capiendo to take loitering and wandring Monk is of less concernment: Also a Clerk of a Parish removable, shall never have Mandamus, but he that by Prescription is elected, having a fixed interest, shall have it. Also in Case of Offices, this Court hath always granted it, there being no other remedy for the place till W. 2. that gave the Assize; and the Court cannot take notice of the duty of the place, till the Return, in that its never averred that the place is for publick Government in the Writ; and so its all one with this, and the Alderman. Also by Wild, the King hath a Moiety of the profit of this River, and this Office of Treasurer is particularly named in the Patent, which being not in Dr. Goddards Case, was the Reason he had no Restitution: And Cooke, the Clerk of the works, is only appointed by the City of London, and is no more a standing Officer then an House-Keeper, and therefore had no Mandamus. And by Mr. Attorny, the only reason of not restoring Dr. Witherington was, because there was a Local Visitor, else the Court would have done it. Keeling conceived Mandamus ought to go to a Lay Corporation made by the King, unless the difference be betwixt the individuals, and no inconvenience; for if they have pursued the Patent, it may be returned; and if it be not granted, there will be a mischief without remedy, which is not to be suffered: If the Court can enlarge their Writ & in omnibus agree with Maynard, also in Cooks Case, it was never pretended that he was a Member of any Corporation, but only appointed to survey, &c. Also all Corporations are private, but when made by the King, and its

its Officers appointed by him, he ought to have an account of it. Windham, Take the same Rule in this Writ, as in Prohibition, that unless the Count be satisfied it ought to go, they will not grant it: and as this case is, it ought not to go, in that for private Office the King hath given remedy by Assize, or Action upon the Case, and I never heard of a president, that a Writ was granted to such an Office, as 8 Co. Jehu Webs Case, or to a Fellow of a College (contrà by Keeling, they ought to have it:) But where the Office concerns some publick or necessary work of Government, or Administration of Justice, of which kind this Office appears not to be, but only private, and their Treasurer only Elect to keep their stock, and so if Freehold, Assize, if not, Action upon the Case, is the proper remedy for removal. Twisden remember it granted for Clerk of a Parish and Schoolmaster, which was the lowest: And of what nature this Office is, we cannot know till they Return, and therefore Mandamus ought to go. Hyde agreed, that generally on complaint of such Officer, as the Court can take notice of, Mandamus shall be granted: But I can never assent it shall be granted for Parish Clerk or Churchwarden, which are Ecclesiastick Officers; nor can the Court take notice of a Schoolmaster. But this is Corporation of an other nature then Fellow of a College, for whom it lieth not, and I know the Treasurer is Eligible every year, and yet as Members, they have interest, and may pass their interest, and share by Fine, and surrender in Court; and had they been removed from being Members of the Corporation, I would not doubt to grant this Writ: And now in regard, if it be denied, the Court doth determine the point before-hand, that no Restitution will lye; therefore I agree it be granted: But all doubted that no Restitution will ever be granted.

Schoolmastes is a Spiritual imployment 11 H. 4. 47. pl. 21.

The King and Cromer *against* Cooke.

(115) Bail.

Coleman excepted to an Information, Tam quam, in that there was no Pledges put in, because the party may be amerced, which the Court denied. And, by Hyde, before 18 Eliz. such Informer should not pay Costs. 2. Judgment was generally Ideo consideratum est in Sessions for the County at Bury, and doth not say per Curiam, which he conceived Error. 3. The Venire facias 12. was awarded de S. &c. not saying de visineto, which, per Curiam, is ill in Inferior Court; but in this Court the Venire facias is 12. &c. only, is sufficient. Judgment Reverst.

The

The King *against* Aylet. Ante.

(116) Excommunication. THE Court discharged the Defendant, because the Excommunication on which he was taken, being on quarrel with the Register, was not before Recorded in Court, and so, by Windham, is the constant Rule of the Books, where he is not taken for any of the Causes in the Statute, for which particular Penalties are annexed; but, per Curiam, the party stands still Excommunicated.

Gardiner *against* Moefield. Ante.

(117) Usury. 44 Ed. 3. 2. b. pl. 8. An Attaint held good. IN Debt brought in Ely Court, on the Statute of Usury; assigned for Error, that as 6 Co. 19. b. Gregories Case, it ought to be brought in one of the Courts at Westminster, and not there, to which the Court inclined: But the Judgment being Misericordia for Capiatur, it was Reversed per Curiam.

Philips *against* Taylor.

(118) Baron & Feme. AFter Imparlance, it was pleaded in Bar, that the Plaintiff took Husband, on which Issue was taken by the Plaintiff, to which the Defendant demurred: And by Twisden, that's the best way, for if it had been tried, it had been peremptory, but now only Respondeas ouster, which was agreed. Hyde absente.

Hargoll *against* Creamer.

(119) Escape. IN Action of Debt upon Escape, the Original and Capias, which was Returned Cras. Mart. in Mich. 1658. was set forth, and that Sydly in exitu ab officio in Decembre, after the Return, he delivered him over to Creamer, and it doth not appear that the Prisoner was ever in the Custody of Sydly, which Coleman moved in Arrest of Judgment: But by Windham he could not, else be turn'd over; and its expressly said he was in Custody, and it may be no Writ was return'd by the Sheriff: And although in Law he cannot be in custody till the Return, yet that shall be now intended; also it need not be said that Sheriff was continued in his Office above his year. Judgment for the Plaintiff.

Holloway

Holloway *against* Chamberlan.

(119) Ejectment. In an Attaint a *Nisi prius* cannot be granted against H. in *Newgate*, because always present, 44 Ed. 3. 2. b. pl. B. Jurisdiction 29.

Ejectment is brought against one in Custodia here, of Lands in County Palatine, and the Action was laid here, and the Record sent down by Mittimus from hence, and a special Indorsement of the Postea: But Done *against* Rogers in Trover, it was held such Action is not maintainable, but only where the party is taken by Writ Original, as Prices Case: But, by Windham, this is only in Actions personal, which follow the person, not real, as Ejectment. Sed Adjornatur for the Novelty.

Bickerton Executor of Audly *against* Bonefoy.

Friday, No. 27.

(120) Limitation.

Twisden and the Court conceived, that in Action upon the Case on a promise to pay, where the Defendant pleaded the Statute of Limitations, and that being after waived, pleaded non Assumpsit, before which the Plaintiff did make it Satisfacere; on which Issue is taken that this is but a Jeoffail; for Solvit is only of the Mony, but Satisfacere may be any other way. But the Plaintiff having amended his Declaration, while in Paper, before Issue, Non Assumpsit pleaded for the Defendant, and made it Satisfacere, all is well. The second consideration was, if the Plaintiff would forbear, that then if she did ever pay such a Debt, the Defendant would pay; which, by Wild, in Arrest of Judgment, is ill, in that Averment is only of a forbearance to a particular day, whereas the Defendant is to be totally forborn, which the Court agreed on demurrer: But after Verdict, the Court will, by Hyde and Keeling, intend it good, as in Arbitrement of all causes to the day of the Award, on submission to the day of the Bond, the Defendant must shew any causes newly arisen: But Twisden and Windham contrà; the Plaintiff here ought to intitle himself by the forbearance, which as this case is, ought rather to be intended till the payment of the other Debt of Senior, then absolutely, as if there were no reference of the forbearance at all: also by Hyde, the Executor was suable although no recovery could be had against him; and so the Original Action was gone: But by consent, the Plaintiff took Judgment for Security, and went to new Trial.

The King *against* Spearing. Ante.

(121) Poor. THe Justices and Overseers and Churchwardens of Spalding, or Bledon in Somersetshire, put Hannah Williams an Apprentice on the Defendant, who was Parishioner, but no Inhabitant, on which the Defendant appeal'd to the next Sessions at Taunton, who confirmed their Order by the Defendants consent; for contempt of which, he was Indicted after at Bridgwater Sessions, and removed the Order and Indictment hither; and now Serjeant Merifield prayed a Procedendo, in that by 43 Eliz. the Child is well placed, in that the Defendant hath agreed to it by Appeal: But, per Curiam, the Defendant is a Draper in Axbridge another Parish, and may have 100 l. with one, and this is a poor Child, which cannot by them be bound an Apprentice; but in regard the case was of General Concernment, therefore the Court declined to give any Opinion, but referred it to the Justices of Assize amicably to make an end; præter Keeling, who would have this setled by the Court here, specially because the Order being removed, cannot be sent down by the Procedendo, which the Court agréed, but yet copies may, which is sufficient for the Justice of Assize to compose the heat of Prosecution in presence of the Justices.

Collet *against* Young. Ante.

(122) Aud. Quer. AFter Judgment against Deputy of the Commissioners of Excise had 1655. in Action of false Imprisonment, the Defendant brings now an Audita Querela on the Act of Oblivion, in that the Imprisonment was made by Colour of their Authority; and Serjeant Witherington moved in Arrest of Judgment, that this Action lieth not, the Verdict finding it was not done Virtute, but only by Colour of such Authority. Sed Adjornatur 640. pl. 9.

Heliar *against* Brown.

(123) Arbitrement. NOta pro Regula, when parties by Rule of Court submit to Award, he that will have an Attachment must by Affidavit Suggest breach, and then the Defendant may come in and plead nullum fecere arbitrium, or shew cause why an Attachment should not be awarded, and so the matter may come in debate; but no Attachment may be awarded on general Suggestion of breach, without notice.

Tilford

Tilford *against* French. Ante.

THe Court were of Opinion no Action of Debt or Action upon the Case would lye, but only an Action upon the Case on mutual Assumpsits; and by Consent a Nil Capiat per Billam was awarded against the Plaintiff. (124) Assumpsit.

The King *against* Chedwick. Ante.

Saturday, Novemb. 28.

THe Court conceived that the Indictment ought to aver that the Goods were in the Trunk, and then apply her false Oath, said to be, That the Trunk and the Goods therein were the Goods of J. S. and not barely to insert this in innuendo; and on Information of the Counsel pro Rege at the Trial, that the Evidence against her was not sufficient, the Court arrested Judgment, and discharged her. (125) Coron.

STroud Jun. moved to quash an Indictment of Riot, said to be taken ad Quarterialem Sessionem Pacis tent. in Comitatu, and not said pro Comitatu, Sed non allocatur for being in the County, and said the Quarter Sessions, it must needs be intended for the County. (126) Peace.

NOta pro Regula per Curiam, No Motions for Prohibition, unless quia Comitatus Anglicanus, or such as need no defence, nor for reading Records, to the intent they may be made Conciliums the next Term, unless for special cause, as to prevent Priviledge of Parliament near at hand, &c. Nor to make Reports, unless specially ordered by the Court: Nor for Judgment, or in arrest of Judgment, unless the Postea by delay of the Attorney were not put in till within a day or two of the end of the Term, ought to be made the last day of the Term. (127) Prohibition.

The King *against* Whetstone.

THere being a Demurrer put into an Indictment for keeping a Bawdy-house without any Counsels hand. Stroud and Holt prayed the Defendant might waive it, and be admitted to plead, which the Court refused (as they had done yesterday in the Case of Alcock, who was Indicted for being Continuus communis & assiduus perturbator Pacis) because this Priviledge can be granted to none but to the King, although the (128) Bastardy.

Kings Attorney do consent that they may waive, especially after the King hath taken such Defendants at their words, and joyned in Demurrer; whereupon the Court fined him 200 l. and Imprisonment till payment, and without Bail or Mainprise until next Term, and then to come into every Court with a Paper on his Head, Subscribed, For keeping a Common Bawdy-house; which was done accordingly.

Chat and Edgar. Ante.

(129) Marchants.

THe truth of the Case was, That a Butcher having bought Cattel of the Plaintiff, who was a Grasier in Norfolk, came to the Defendant who was a Parson, and desired him (having Mony in London) to draw a Bill to J. S. in whose hands it was, to pay the Plaintiff, and that he would repay the Parson in the Country, which was done by the Parson, with private advise to J. S. not to pay the Plaintiff till he had received the Mony of the Butcher, who broke and became insolvent, and so on default of payment by J. S. the Plaintiff brings an Action upon the Case against the Parson, Suggesting the Custom of Merchants to be, that if any Merchant or Trader, or other negotiating for him, procure or do draw any Bill unto any other Merchant, or other negotiating for him in England, that then, if he to whom such Bill is directed, do refuse to pay, he that drew the Bill shall be chargeable; and after Not Guilty pleaded, and Verdict in Guildhall for the Plaintiff, Winnington in arrest of Judgment, excepted, That it was not averr'd that he for whose use the Mony was to be paid, nor he that drew the Bill were Merchants, Sed non allocatur, such Merchants referring only to the Procurers, or such to whom Bills are directed.

DE

DE TERMINO Sancti Hillarii,

15 & 16 *Car.* II. *B.R.* Die Saturnij, Jan. 23. Anno 1663.

Hyde *Chief Justice.*
Twisden,
Windham,
Keeling.

Bradley *against* his Wife. In Baron & Feme, Br. 1.

HE procured J. S. to Sue him and his Wife in an Action for Goods taken away by her, and had Judgment by confession of the Husband, which the Court set aside as illegal: But if on Issue it had been tried, J. S. might have taken both. 2. They ordered all such Bonds and Writings of the Husbands, as she took away, to be re-delivered by her to him. 3. They refused to bind him to the Peace at her Suit, unless her Life be in danger, because by the Law he hath power of Castigation; and the Bishop of London had certified he used to beat her, but that she used to provoke him; and that by reason of their wilfulness he could not end their difference, according to the reference of the Court last Term. (1) Baron & Feme.

Fords

Fords Case.

(2) Prohibition.

HE moved by Keeling for a Prohibition to the Arches on 23 H. 8. cap. 9. being cited out of the Diocess of London; But, per Curiam, there is an ancient Composition by Usage betwixt the Archbishop and the Bishop of London, that the Causes in one may be sued in the other Diocess, as in 2 Cr. But by Twisden, this ought to be pleaded, else the Court cannot take notice of it. Adjornatur.

Primate *against* Sir J. Jackson. Ante.

(3) Perjury.

THe Court will not suffer any new Trial in Perjury, although the parties do consent after acquittal, nor in this Information, which was against the Defendant for Subornation of Witnesses, to prevent the Evidence for the King, will they suffer it now he is found Guilty: But they committed him to Prison (for the present,) but ordered no Action or Execution to be charged on him whilst under the Criminal Side.

Mr. Attorny *against* Roch. Post, 639 pl. 7.

(4) Ancient Demean.

STroud moved for an amendment of Scire facias in nature of a Writ of Disceit, grounded on a Judgment in C. B. of Lands ancient Demean, and the Entry on the Record was of Judgment coram Johan' St. Johns, & Sociis; but the Original Writ of Disceit was right, Coram Olivero St. John, &c. which being to disaffirm the Judgment in Dower, the Court (although otherways inclining to do it) would advise.

Bayly *against* Bunning.

(5) Bankrupt.

IN an Action of Trover against Bankrupt by Assignée of the Commissioners, the Visne may be laid in Middlesex, whence the Commission issueth, or in the place of the cause of Action at the Plaintiffs Election, per Curiam, the Commission being the Foundation of all.

The

The King *against* Forth, Dashwood, &c.

JOnes moved to quash an Indictment of Forcible Detainer and Entry, removed hither without any Process for want of addition, there being one Elinor named intermediatè, and after others named nuper de L. Yeomen, which cannot refer to all, as Dyer 46. b. pl. 2. Sed Curia contrà, were Eleanor intended a woman (which the Court cannot do here) for that Eleanor may be as well meant a man. 2. The Charge is of Forcible Entry into several parcels, and detaining only one, which, per Curiam, is well enough, being Vi & Armis; and they ordered a Trial on it, and wanting Vi & Armis in the Ejection is not material. (6) Force. In Brief, Fitzh. 26.

Sir John Jacksons Case. Ante 638. pl. 3.

Munday, Jan. 25.

HE now again desired a new Trial at Bar, which the Court refused, and fined him 1000 Mark, imprisoned for a Month, and after to be of good behaviour with Sureties of 500 l. a piece for a year, and after at the pleasure of the Court; but that no other Actions should be charged on him by other persons without leave of the Court. (7) Perjury.

Coply and Dr. Sherrock *against* Boucher. Ante.

WIld moved for a Prohibition to the Arches of London, as Lessée of the Vicaridge of Langford in Oxon, the Corps of the Prebendary of Lee de Lincoln, for that the right of Freehold, viz. the place of the Official, which the Plaintiffs had granted to J. C. was in question, the Defendant claiming as Grantée of the Dean and Chapter of Lincoln. Windham conceived it strange that this Jurisdiction should be grantable with the Corps to a Lessée, being a personal thing annexed in point of trust to the Corps, which Hyde Chief Justice agreed; but by Twisden, the validity of the Grant, as about 4 Jac. B. R. in the Case of the Register of the Admiralty was resolved, is triable at Common Law: So by Keeling; and the Jurisdiction being Temporal, although the person be Ecclesiastick, may pass by the Grant of the Corps, especially if it have been so used: Also per Curiam, unless there appear sufficient ground for a Prohibition, they will never put the party to take Issue, or to demur to any par- (8) Encumbent.

particular point: also general words of all profits and advantages will not pass, a Commissary or Officials place being a meer matter of Jurisdiction, and not like a Registers place, but rather, by Windham, is like a Recorders, who cannot make a Deputy without a Special Grant or Custom. Adjornatur.

Young *against* Collet. Ante 634. pl. 122.

(9) Aud. Quer. SErjeant Witherington on 1 Inst. 290. moved in Arrest of Judgment in Aud. Quer. brought on the Act of Oblivion, to avoid Judgment thereby made void, as being had in the late times, Issue being taken that the Judgment was not given by virtue of any Commission of the late Powers; and indeed it fell out that the Warrant was executed by a wrong Officer, and the Act of Pardon extends not to any Cases not warranted by the Law of the times: Also the Act of Parliament is only recited in the Writ, not in the Count, as it ought to be. Jones for the Plaintiff, This was done colore of the Law of those times, although not virtute; and the Act of Parliament comprehends both, and giveth a new Remedy. Also in this Court Aud. Quer. is like Scire Facias where the Writ is the Count, which the Court agreed: The Action of false Imprisonment was in 1655. and Verdict for the Plaintiff, and Judgment, but no Execution; and by Keeling, the Act of Parliament did not intend to indemnifie the Defendant, or any that could not have justified themselves by the Law of those times; also whatever was done in those times was then virtute, but now only colore, and the Meal Act is not material; Twisden accorded, because the party ought to have demurred, and by taking Issue hath waived the advantage of the Act of Oblivion, but else he conceived him clearly relievable by the Act; so by Windham; and colore in the Act is of larger extent than virtute in the Law of those times, and extends to the equitable parts, as this, the Committee of Indempnity, having protected the Defendant against Execution in those times: But per Curiam, on perusal of the Act, all Judgments and Executions are vacated which relate to any acts of Hostility, or relating thereto, but only Actions or Suits are discharged by the latter Clause, and all Prosecutions and Molestations, which per Curiam, præter Windham, extends not to Judgments. Adjornatur.

Jeakell

Siderf. 172. pl. 2. Powis and his Wife *against* Maskall.

IN Trover by them of her Goods loſt dum ſola, and converted ſince the Marriage. Jones moved in Arreſt of Judgment, becauſe the Wife is joyned, the Converſion being the Gift of this Action, and the Trover but an Inducement to it, and this ariſing during the Coverture (the Property being veſted in the Husband and his Executors) he only ſhall have the Action; ſo on Bailment before: So in Caſe of Replevin, Repl. F. 43. the Husband only ſhall have it on a taking dum ſola: So of Detinue, Moor 25. pl. 85. the Lady Audleys Caſe. Twiſden agreed, theſe Caſes being in affirmance of the Property in the Husband; but Trover doth diſaffirm it, and by Iſſue the Husband hath admitted the thing out of the Wife, and is only Treſpaſs upon the Caſe, wherein not the thing it ſelf, as in the former Actions, but only Damages are recoverable, which the Court agreed, præter Keeling, who agreed the difference. But this Action affirms a poſſeſſion, and not any tort, as demand and denial, although Evidence is no Converſion alone; but the Doubt is from what time the Property is diſaffirmed, and he conceived only from the Converſion; for the firſt poſſeſſion is ſuppoſed by finding without wrong, and ſo is no Treſpaſſer ab initio. Twiſden was ſtaggered on Heb *againſt* Lons Caſe, that Trover was in B. R. brought by the Executors of the Husband of loſing by Feme dum ſola: Alſo by Hyde, the loſing is but the general Count and Form not traverſable; but the Goods might be taken away by Treſpaſs and by Command after Converted, which Windham agreed. Adjornatur. (10) Baron & Feme.

Jeakell *againſt* Paſcall.

AFter the Teſte, and before the Return of Attachment of Priviledge in Action for Fees, the Defendant confeſſed ſeveral Judgments on Bonds, and at the Return pleads Plene Adminiſtravit, and beſides thoſe Judgments riens entre mains: To which the Plaintiff demurred, as being Judgment of the ſame Term. The Defendant joyned, and the Plaintiff entred the Record as from the Teſte, and not from the Return, as he ought, becauſe no Bail or Appearance can be till Return, whereby the Defendant was ſurpriſed; and per Curiam, were the Bonds ſubſequently ſued to the Plaintiffs Action, which is but indebitatus, they muſt be paid firſt, or elſe there will be a Devaſtavit. The Court ordered the Demurrer (11) Adminiſtrators, Br. 37.

murrer to be waived, and the Record to be entred as of the Return of the Writ; and the Defendant may aver payment mean in Bar. Post.

Siderf. 173. pl. 3. Swift *against* North.

(12) Heir. IN Debt against an Heir who was by Guardian, after Paroll Demurr and Resummons, & Capias alias & plur. at 5. exact' the Defendant appeared, and after Riens per discent præter pleaded, confessed the Action in the C. B. and now it was specially assigned for Error, that the Plea was discontinued, for that the Writ was not continued on the Roll, as Co. Entr. Error pl. 7. & Rast. Discontinuance in Error. Also 2. The Appearance was at the Exigent, and no Supersedeas nor Utlary returned, which, per Curiam, are all cured by Appearance of the party. 3. There was no Entry of the admission by Guardian certified on Record, nor Diminution prayed, which after in nullo est Erratum cannot be prayed, but the Court may grant it to affirm the Judgment; also there being no Return made now of this, the Court cannot intend that it is, or is not: But he that assigns this for Error, per Curiam, ought to pray a Certiorari, that the whole Record may be certified; and if they Return there is no Writ of Admission, the Defendant may alledge Diminution, for else the Court will intend rather that there is an Admission, and now no Certiorari can be granted to reverse the Judgment, but Affirmatur, Nisi.

Siderf. 173. pl. 4. Guy *against* Goddard, &c.

(13) Utlary. IN Action upon the Case for Pony on Sale of Butchers Meat after Verdict against one, it was moved in Arrest of Judgment, for that after the Writ, and before the Count, it is Entred Sciendum est quod one of the Defendants are Utlawed, whereby the Plaintiff was not intitled to sue both, but only one, being a joynt Contract; and per Curiam, had this been demurred to, it had been naught, but not so after Verdict. But by Jones, this is a Repugnancy, that two should be attacht, and yet one Utlawed, the Capias being only on default of Goods, per quod attachiari potest. 2. It was not said that the Defendant was Utlawed super Breve illud: Nor, by Twisden, is this Sciendum any express averment; and if it were, it must be placed in it's right place, else it overthroweth all if demurred to, and the Verdict will not help the other Exceptions,

per

per Curiam, of the Sciendum, which is but recital, and the not saying the Utlary was in Breve illo. Adjornatur.

Carpenter *against* Marshall.

Trin. 1659. Rot. 849.

Tuesday, Jan. 26.

IN Ejectment on Demise of Philips by Special Verdict, it was found that Queen Elizabeth, in right of the Dutchy, was seised of the Mills in question, which lay out of the County Palatine, and by Grant under the Dutchy Seal granted for Lives, and the Reversion discending to King James, he granted to the Lessor of the Plaintiff surviving the other Grantee Ferrers; But there (by Jones for the Plaintiff) was no Attornment, but the Grant was under the Great Seal, the Dutchy Seal, and of the County Palatine, by 3 H. 5. cap. Rast. Entr. 524. 636. No Grants of any Possession shall be under any other Seal than the Dutchy; so the rest are out of the Case: But of Lands that are out of the County, by 37 H. 8. cap. 16. they must be by the Dutchy Seal; but for Lands within the Seal of the County Palatine is sufficient: And at Common Law, Lands which the King hath in his Natural Capacity, Pl. Com. 213. or in right of the Dutchy, pass from the King without Livery. And the Statute of 1 H. 4. cap. hath made no alteration as to this point, but intended to preserve the Dutchy Inheritance, and the Reputation thereof, distinct from the Lands of the Crown; and although there be general words, That they shall be as if we had never taken the Crown upon us, yet doth these Lands, where it stands with the intent, partake of the Kings Prerogative, as the Kings Nonage shall not prejudice his Grant, in 13 H. 7. 16. b. pl. 5. and 15 H. 7. 17. aid shall be prayd of him at any time for such Lands; also an Usurpation to such Lands shall not prejudice the King, 3 Cr. 240. But I agree 26 H. 8. 9. and in 21 Ed. 4. 60. Livery and Seisin is held necessary of Dutchy Lands, because the King may do it by Attorny; but here, unless the Lands pass without Attornment, the King will be in a worse case than a common person, in that the Tenant is not compellable to Attorn, for that the King can have no quid Juris clamat, but he must levy a Fine by way of Grant and Render, 11 H. 7. 12. b. pl. 7. And it's contrary to the Supposal of the Fine, that the Defozcer should have a quid Juris clamat, and therefore the Makers of this Statute never intended so much

(14) Franchise.

The same Reasons may be urged of Lands granted to the King, yet that by *fait Enroll* passeth the Estate without Attornment. Br. 57. in Grants, Br. 82. 27 H. 3. c. 27. §. 20. Vide Dyer 50. pl. 1. c. Fine of Rent shall not be Ingrossed till Attornment, &c. 17 Ed. 3. 29. pl. 28.

to prejudice the Inheritance, as to put him to Attornment: And 6. Co. 68. for this reason the Reversion is in Cestuy que use without Attornment, because he can have no quid Juris Clamat; also the expedient devised in 4 Inst. 210. is an Equitable Writ out of the Chancery of the Dutchy to the party, whereby only his Body shall be Imprisoned; and this could not be by custom, for that the Lands began but in Edward the thirds time: Also 4 Inst. 209. is Cooks express Opinion, that the Lands out of County Palatine doth pass at least as to the Estate.

Without Attornment if grantee expend on suit by, or against the Tenant for Life, its Maintenance. 9 H. 6. 64. pl. 17. by *Newton* and *Strange*.

Weston for the Defendant, the Dutchy Seal is a Record, so as to conclude the party from pleading Non est factum, but not so as to pass the Estate without Livery and Seisin, which hath been adjudged necessary; and the reasons that Attornment should be had, are as great as for Livery, as that publick notice be given to the County, and that the Tenant have some Election in choice of his Landlord. Also this is a quality that runs with the Realty of the Land, 1 Leonard. 12. Moor 149. Bonnys Case, not any personal thing, which he agreed pertook of the Kings Prerogative, as the King must make a Demand to Re-enter into Lands, parcel of the Dutchy, that lye out of the County, for condition broken. And in Moor 153. its obiter held, that Attornment is as requisite as Livery, in that it hath as much interest on the Freehold, 2 & 3. Ph. & Mar. cap. 20. Its requisite that the several Lands exchanged for and annexed to the Dutchy Lands, that they pass by the same Livery and Attornment as others: Also, per Curiam, no Privities will pass without Attornment; and the Estate will be fruitless without them; but the constant practise since 1 H. 4. hath been, to pass them without Attornment; and else, by Windham, it would be dangerous, that by the Kings death before Attornment it would be void.

By Re-entry of Lessee on a Feoffee of H. in Reversion, A. is only enabled to enter for forfeiture, not to have debt for Rent, or to punish wast. 2 H. 5. 4. b. pl. 19. by *Lodington* and 5 Co. 113.

Adjornatur.

Terry *against* Couper. Ante.

(15) Slander.

JOnes moved for Judgment in Action upon the Case by Lime-Burner, for saying, de eodem querente, & arte sua, Thou art a Cheater, which are Actionable after a Verdict, without Colloquium of his Trade; for this is but Evidence to the Jury to find the words spoken of his Trade, as anciently it was doubted, that words in the third person were void, 2 Cr. 674. Smith *against* Ward, without Colloquium of the person, as (He said, &c.) But this is supplied by Verdict, and there adjudged good, & de arte is as good, 1 Cr. 515. as de persona,

sona. 2. That a Lime-Burner is such a Profession as may maintain an Action, in that its said he got his living by buying Culm. Winnington for the Defendant, its not said that buying and selling of Culm is incident to that Trade. Hyde, His Profession is but as a common carrier of Chalk, and not within the Statute of Bankrupts; and so to say he is run away alone is not Actionable; nor to say he is a Knave, by Keeling, without a Colloquium but else, the meanest way whereby any get their living, being scandalized, its Actionable; and this Colloquium; cannot be supplied by these flourishing words of the Plaintiffs, without shewing the particular Circumstances of the Trade, whereby the Standers by may understood the words Scandalous, and Verdict will not help. Windham agreed, Scandal to any Trade or Imployment, as Porter, Apprentice, &c. being a means to take away his Livelihood, is Actionable; but I doubt this saying, de arte, doth necessarily require that the Trade must be proved before a Jury. And the design of the words, (although spoken occasionally without Colloquium) was to wound his Profession, and so Actionable; and so is the Case 1 Cr. 515. which differs nothing from words spoken de Querente, for that the Jury in both must be satisfied that they were spoken (De). Twisden agreed in omnibus: Hyde accorded with Keeling, that the Action will not lye, because there is nothing in the Declaration that concludes it a Scandal of his Profession, for that the buying of Culm and Stone, may be a distinct Art; and so the words, de arte sua uncertain, to which they may be applied. Also these are no Trades within 5 Eliz. that may take an Apprentice; But how mean soever, had the words been particularly applied to his dealing in such callings, they would have been Actionable. Hill. 1655. in Rot. 2332. Snape *against* ..... in C. B. to say of Lime-Burner, with special Colloquium of Lime-Burning with the Plaintiff, and with some of his Customers, said, He was a Cheating Knave, and a Devil, and yet because he had not laid, that the Plaintiff had not alledged it was said of the Plaitiffs Lime-Burning, or of his Dealing in Lime-Burning, adjudged not Actionable; and the saying de arte sua doth not necessarily imply any necessary Proof before a Jury, without a special Communication of his Dealing in the Trade.

Adjornatur.

Aleway

In Damages Br. 52. Aleway *against* Roberts. Ante.

Mich. 1658. Rot. 894.

(16) Damages. March. 88. pl. 142.

THe Court before, and now were of Opinion, that the death of the Heir or Ter-tenant, after Feoffment to J. S. before any inquiry of Damages executed, doth discharge the Damages, in that there is no person against whom this Scire facias can be brought: But if the Heir had been alive, his Feoffment being pendant on the Writ of Enquiry, and after it was awarded on the Roll, should not prevent them. Also the Ter-tenant, as to the Damages, hath committed no Offence, but only the Heir, by not rendring Dower, which is personal, as an ordinary Writ of Enquiry in Trespass: But Keeling doubted, in respect the Feoffment is pendent on the Writ, the Feoffée is bound; and the Damages are here only accessory, and the Judgment binds the Land. Adjornatur.

Salvin *against* Hern & Uxor.

(17) Baron & Feme.

THe Plaintiff being intitled to Administration, doth agrée with Feme Covert by Déed, that in Consideration he would suffer J. S. to prove a Will, and take Administration, she would pay to the Plaintiff, &c. which being a benefit to her, and at her request, and to her use, she might, after promise without Déed, if the benefit continue. I agrée this Writing void in it self, but when she will when she is Sole afterwards, as in our Case, promise to perform the Contents thereof, it's sufficient for the Action, notwithstanding that Wild, the Kings Serjeant for the Defendant, in Arrest of Judgment, had alledged this to be but nudum pactum, the promise being grounded on a void Déed, and so no Consideration: Also the promise on the Plaintiffs part was only to permit J. S. to take Administration, and be aiding and assisting to the getting in of the Debts of the Testatrix Rebecka Salvin, but there is mention that the Plaintiff was entitled to Administration; also the promises on the part of the Plaintiff are executed, and not continuing: Also one promise in the Déed was to pay money, if received in six Months, or else on request would procure her Husband and J. S. to enter Bond, which by death of the Husband is become impossible, and the subsequent promise void. Adjornatur.

Guy

Guy *against* Swaile.

Hil. 14 & 15 Car. 2. Rot. 665.

IN Debt on Obligation, Condition, that whereas there were several differences, &c. concerning Accompts, &c. now pendant in Law and Equity betwixt Tho. Prince and William Santloe, which are referred to the final Arbitrement of J. S. and J. N. &c. That if now the said Referrées do make and give up their final Award of and concerning the said matters now in difference, &c. that then if the said J. S. the Defendant, his Executors, &c. do truly pay, &c. to W. G. the Plaintiff, the full Sum of 100 l. &c. out of the first 200 l. that shall be received by the said T. P. of the said W. S. upon or by virtue of any such Award, &c. and in Case no such Arbitrement be made by the said Referrées, nor the said 100 l. paid as aforesaid, or otherways, that then if the said T. P. shall render his Body in Execution by the 25. of December, 1658. on a Judgment agréed to be entred in B. R. against him, as of Michaelmas Term next, at the Suit of W. G. for 240 l. in Case T. P. so long live, &c. that then, &c. The Plaintiff avers J. S. did not pay the 100 l. to W. G. nor did T. P. render his body, &c. The Defendant pleads that T. P. at any time after the making the Arbitrement, and before the Action brought by W. G. hath not received of W. S. 200 l. nor any peny thereof, & hoc, &c. To which the Plaintiff demurs. (18) Arbitrement.

Ford *against* Welden. Ante.

Wednesday, Jan. 27.

POwis against the Prohibition, in that this Citation for Appearance is not out of the Dioces, and the Arches have anciently sate here; and 1 Cr. 339. Gobbet. Mich. 6 Jac. C. B. 2 Brownl. 1. Lewis & Porter *against* Rochester, is express in this point, that by reason of the Composition no Prohibition was awarded; and that the 94th Canon doth agree with the Stat. 11 Jac. Tye *against* Coxe, such Prohibition was allowed in C. B. because the Suit was before the Archbishop, as Guardian of the Spiritualties, but it was never denied when the Suit is as Metropolitan. Keeling Jun. Composition to remit all Causes, is expressly against the Statute, Hub. 185. and however, such Composition must be pleaded. Also this Suit will prevent Appeals, which in case of Suit before the Arch- (19) Ordinary.

Archbishop can be only to the Delegates: Also Compositions do not bind the Successors, Pricavers Case, Hub. 178. and where both Jurisdictions concur in him, yet he must hold his Court where the Cause of Suit is. Judge Keeling, The Jurisdiction of the Arches is a peculiar one that the Archbishop hath of fourtæn Parishes in London, 13 Co. 4. and not as he is Archbishop; for the Statue of 23 H. 8. 9. was made to limit and bind the hands of his Legative Power, 1 Cr. 97. Smith *against* Poindrell, a Prohibition was denied, because the party himself had admitted the Jurisdiction and appealed: But before such Prosecution, 1 Cr. 162. Cadwallider *against* Brian, a Prohibition was granted, and so it ought here.

Adjornatur.

Siderf. 173. pl. 5. Dudly *against* Byron.

(20) Variance. IN Scire facias quare executionem non of a Judgment before Oliver late Protector only, not saying of the Dominions of England, Scotland, and Ireland, and the Territories thereto belonging, nor &c. in the Court of Upper Bench. On Nul tiel Record pleaded, the Record is certified before Oliver late Protector, with the Stile full; also it is not said the Kings Bench in the Scire facias, being then at Westminster, Sed non allocatur: But by Twisden, the Act of Judicial Proceedings doth not confirm any Record under such Stile of Oliver Lord Protector, but only with addition of Dominions and Territories. Also had the Defendant demurred, the second Exception had bæn fatal, but by Nul tiel Record pleaded is waived: Sed Curia contrà, the Act giveth no countenance to the Stile, but only that such Judgments shall not be Reverst; and it's not fit to use his Title at large, as the Kings, which is ancient and known.

Hutton *against* Fowke.

(21) Wales. THey being Patentées of the Office of Wardrobe of the Grant of the Lord President of the Marches, and there being difference betwixt them and the former Patentées about the profits, they prayed a Prohibition, because the Freehold is only in question, whether grantable by the King or the Lord President; and although the party by Dures hath consented to try it in the Marches, yet that cannot alter the Law, which the Court agréed, the Accompt between them being but a Consequent of the Right. Adjornatur.

Dudly

Dudly *against* the Lord Byron. Ante.

BY Keeling, the Act of Judicial Proceedings intended only to confirm the things transacted in the Courts, not the Courts themselves: But as in Sir George Binions Case, late in C. B. on Suit of Parliament man by Original, it was held good. It was also held, that notwithstanding the Act, any man may plead there were no Courts of the King then at Westminster, nor any other Legal Courts, which the Court agréed: And this Scire facias, saying only Coram Olivero, &c. is true, although the Record be larger. Hyde Chief Justice, Had the Judgment béen Coram Olivero nuper Protect. it had not béen confirmed by the Act, and therefore the recital of it in the Scire facias is materially variant, & postea Judgment for the Plaintiff. (22) Pardon.

Execution, Br. 98. Sir Charles Stanly. Ante.

COleman, after his Pardon allowed, prayed leave of the Court to charge him with an Action, which Twisden and Windham agréed, as Banister *against* Trussel, Co. Entr. the Court being discharged of him by his Attainder; and if the King will never pardon him, there is no reason a common person should suffer: Hyde Chief Justice contrà; He cometh here only to plead his Pardon, and therefore ought to have the priviledge of the Court eundo & redeundo, which Keeling agréed, this being purely the Kings Suit; but the Exigent is mixed with the Suit of the party, and therefore he may be charged. The Court agréed none shall charge him now in Court, nor eundo or redeundo: But for such Charges as were entred against him in the Marshal's Book, there is no reason, by Twisden and Hyde, but they should continue; but yet if any be charged whilst the Court doth advise, they will punish the Attorny that dareth to lay it on, but they will not discharge the Action, unless the Process be continuing against him Criminally. (23) Priviledge.

Mr. Attorny *against* Starling, &c. Brewers of London.

(24) Conspiracy. Sidenf. 174. pl. 6.

WEston moved in Arrest of Judgment in Information against them: 1. Because it is for factiously, unlawfully, and seditiously assembling themselves, &c. not saying Vi & armis, or riotose or routose. 2. The Defendants were charged for Conspiracy to deprive the King of his Customs and Excise, and to depauperate the Fermors, which is not material, the Defendants being found Not Guilty of all the overt Acts alledged in pursuit of the Conspiracy, and of any hindring the Kings Revenue, and therefore it cannot be said they factiously, &c. met together to depauperate the Fermers: But per Curiam, the very Consultation is an Offence, as Poulters Case, without any overt Act. Mr. Attorny conceived Vi & armis not necessary in an Information, especially being for Conspiracy, which is an act of the will, and not for any personal force, and after Verdict especially it's good. 2. The very Conspiracy to do a lawful act to the prejudice of a third person is enquirable and punishable in B. R. inter les Articles, 27 Ass. Also by finding they did conspire illicite prout per Informat. they do implicitely find their Agreement to contribute mony to take away the Gallon Trade, and that they made Orders to brew only small Beer for three months: Also by the Solicitor, as in all the Informations for lessening the Kings Revenue; and as in that against the Duke of Northumberland for conspiring with Sir J.D. to illegitimate the Lady Anne Dudly, because no Process of Utlawry lyeth, it's sufficient for the King that Mr. Attorny only prayeth debitum legis processum. 2. The Not Guilty quoad omnem aliam materiam may be supplyed in the other acts alledged, as the endeavour to raise muting among the people to pull down the Office of Excise, and the first finding would be sufficient, were the rest contradictory to it: The Court agreed the Vi & armis not necessary, in that no breach of the Peace is complained of, or if it were, as for death of man, it were needless, by Hyde, especially this complaint being of a crafty wilyness. 2. Also the very Conspiracy to raise the price of Pepper is punishable, or of any other Merchandise: And by Twisden, if any of the particular facts, which are but Evidence of the design charged, be found, it's sufficient to support the Information, and the not finding the particulars (for which, by Hyde, there was as great Evidence, as the general Charge) is not material. But by Windham, all the particulars of making Orders and contributing Mony, are discharged, and not involved in the generarl

2 & 3 Ed. 6. 15. § 1. N. 3.

Hardie *against* Taylor. Ante.

IN an Action for ſeveral Treſpaſſes done in ſeveral Cloſes in the Will of D. the one is for chaſing his Cattel ad tunc & ibidem, into the Houſe of J. S. whereby they were indammaged, and it was aſſigned for Error after Judgment by Nil dicit in C. B. and ſeveral Damages, becauſe in the Executory Judgment there is intire Damages given pro tranſgr. prædict. in clauſis prædict. not ſaying any thing of this chaſing, &c. which, per Curiam, is incurable: And although Damages are intirely given for the Treſpaſſes in Clauſis, and ſo good, for that all being diſtinctly mentioned in the final Judgment: yet, per Curiam, it's all one, & Reverſatur. (30) Treſpaſs.

Paſcal *against* Jeakel. Ante.

THe Court on Affidavit by the Attorny, that the Bonds are for performance of Covenants, will order the Defendant to deliver a Copy of the Covenants to the Plaintiff, that he may reply there are none broken, but not elſe but by conſent. (31) Covenant.

TWiſden in his charge to the Grand Jury, ſaid, that it's the Duty of every Man in the Country where he lives to ſerve them, eſpecially of you who muſt look eſpecially to ſuch offences as concern the King in his Natural Capacity, as all Treaſons; its the duty of all to give light of what ſoever they know may concern the hazard of his perſon, of which the Law is ſo curious, that it makes the very imagination the Treaſon, of which the Act is but an Evidence; but in other Caſes, although the imagination be puniſhable, yet it doth not alone make any offence. 2. Such things as concern his politick Capacity, all raiſing Arms, palliated with what pretence whatever, either of Religion or removing Evil Counſellors: Its horrid to publiſh in print that any Magiſtrates may be reſiſted, for which they can cite no Law-Book or Statute in *England*: And Men are grown to that hight, that they value not their Lives in Treaſonable Enterpriſes; and therefore above all, you muſt take care of this: But you muſt not forget the Counterfeiting the Great or Privy Seal. 3. Petit Treaſons. 4. All manner of Felonies and Murders, when there is a Bill for Murder againſt any for Killing Men, I like it not, that the Grand Jury ſhould find it only Manſlaughter, for you have good Warrant to find Murder, if a Man be killed (32) Peace.

led, and your Verdict neither accuſeth or excuſeth. 5. All Robberies you ought to be very careful of. 6. All Theſts and Larcenies, and all Acceſſories, before or after, to any of theſe Offenſes. 7. You are to enquire of other Offences, which if neglected, will gangrene, although not Capital, as all Oppreſſions and Force, by what Title ſoever. 8. Of all unlawful Aſſemblies, as all ſuch are that are not Warranted by Law, under what pretence ſoever. 9. Of all injuries done to Mens perſons. 10. Of all Corruption of Judges, Spiritual or Temporal; and of all other Officers, which is a great perverting of Juſtice, eſpecially of Bailiffs, who ought not to keep Alehouſes, nor detein Men in their hands under any pretenſes. 11. Of all Champerters, Buyers of Titles, and Maintainers, who are ſince the *Star-Chamber* put down, much more frequent; and ſo are Forgeries and Perjuries. 12. Of all Common Barretors, and all Deceits in Trade in Meaſures, or Foreſtalling the Market, which is now frequent; particularly in Butchers, who uſe Graſing about the Town, who Clog the Market, when the Country ſend theirs up, and this is a great Offence; the fault of which reſts on you, who are their Landlords; but this is contrary to your Oaths. 13. Of defaults in all Officers of the Watch and Ward, and ſuffring Vagabonds, which is the Conſtables chiefly, whom you ought to preſent: As, 14. All Nuſances of Sellers, and other Inlargements in the Street, and Stoppages by Draymen, and how the Streets are cleanſed and paved: Alſo all Idle Livers, all Bawdy and Gaming-Houſes, and all unreaſonable prices; and of all Inmates, and of all Bridges, according to the late Statute, that they be railed or walled; and all that caſt Nuſanſes into the High-way, or dig Pits. Of all Alehouſes not Licenced, or that keep Diſorder, or are ſeated in Obſcure and unfit places; theſe concerning the Lay part of the Government. And as for the Church, all Sects, if continued, will foment Rebellion and Diſorder, you muſt therefore preſerve the peace of the Church, enquiring of all ſuch as deprave by Books or ryhme the Book of *Common-Prayer*; of all that refuſe to come to Church, who are to forfeit 12 d. every Sunday, and on forbearance a Month he loſeth 20 l. a Month of what perſwaſion they be ſoever: Alſo of all Libells, called Lampoons of any mens perſons, which tend to a breach of the peace of the Kingdom.

The

The King *against* Hereford.

Munday, Febr. 1.

ON Mandamus to restore him to the Town-Clerks place, they Return'd that he was never debite admissus, and so they could not restore; which per Curiam is a flat ground of Action upon the Case; contrà if it had bæn nunquam debito modo admissus, by Twisden; but the rest agreed that also well enough. (33) Mandamus.

Le-fans *against* Moregreen.

THe Defendant Justifies as Marshalls Men of Southwark, for Execution for 6 l. the Plaintiff confesseth the Execution, but saith that one piece of Silk taken was sufficient for the Debt, and that there was other things taken to the value of 50 l. and as to that de injuria sua propria, which, by Windham, is an ill Plea: But, per Curiam, its a great Misdemeanor, and examinable by the Court: Twisden conceived, that if the Plaintiff doth tender the Debt, its a wrong for the Sheriff to sell the Goods; but else he may sell at what rates he can. (34) Execution.

650 4

The King *against* Starling, &c. Ante. 605. pl. 28.

NEwdigate for the Defendants observed, that the point of destroying the Fermors of the Excise is not found, but only that they did factiously and Seditiously assemble and conspire to depauperate the Fermors; but it doth not say in the Excise, which being incertain, as Moor 302. pl. are not to be made good by any intendment, being penal as well as Indictment: Also Conspiracies, that are punishable without Overt Act, must be such as concern the publick, Williams Case 5 Co. which doth not appear here in this general charge, as Fremans Case 1 Cr. 579. but an injury to the Fermors by particular Name. Also though the Information might have bæn good in such General Terms, yet not when the particulars thereof are mentioned, and found for the Defendant, as Meers Case, Hub. 173. Wild for the King, its an inevitable Consequence that the King must lose his Rent where his Fermors are depauperated; and although it may mitigate the matter, that the particulars are not found, yet it remains a great offence, and of publick concernment, it appearing by (35) Conspiracy.

the

the Information that it was given to the King by Parliament, and by him for 118000 l. per Annum for three years setled on Fermors: Also the Jury have found it Seditiously done, which cannot be in Cases of private Concernment: Also in the Oyer and Terminer de falsis Coadunationibus, is one Article of Enquiry. Also by Mr. Attorny, as by 21 H. 7. 39. to assemble his Friends for his defence against H. that lay in wait in passage to the Market, was held unlawful, although to a lawful End. Also the Conspiracy, although an Act ad intra, yet the Communication thereof is an Overt Act 27 Ass. 44. Briefe, F. 926. Moor 786. Grayes Case, and 756. Staffords Case, and punishable, although nothing ensue thereon, and the Conspiracy is the Crime, and thence the Visne shall come, as Smith *against* Thrasher, 20 Jac. B. R. the other Acts are but particular Instances of it: Also that such Conspiracy must appear by some prosecution, that is to be intended Evidentially to the Jury, not otherways: And in Midwinter *against* Scrogg in the Star-Chamber 1636. in which Sir Edward Tourner was Consulæ, the Butchers of London were fined 3000 l. for Glutting the Markets, to the Impoverishing of several Country Fermors, because it was of publick Concernment, and Consequence. Adjornatur.

The King *against* Love.

(36) Trespas. KEeling moved to quash Indictment of Battery, taken ad Generalem Sessionem Pacis (not saying Domini Regis) which, by Twisden and Keeling, is ill; contrà by Hyde and Windham: But they agréed, such Exception may be amended in the Caption the same Term, but not after.

Adjornatur.

Sherroke *against* Boucher. Ante.

(37) Emcumbent. TWisden and Keeling, whither this Jurisdiction of Commissary pass, or not, by Lease of Corps of Prebend cum pertinentijs, is Quæstio Juris, and therefore a Prohibition ought to be granted, whither it pass or not: But by Windham, this is a Trust annexed to the person, and so will not pass, by Lease of the Corps, which being apparent, that it cannot go to Assignée, or Executor, as the Feme Defendant is, the Court, it being in discretion to force Issue, or Demurrer, or over-rule the Prohibition, which he conceived ought not to be awarded. But by Hyde, the right of the Jurisdiction being in question, the party ought to take Issue, or

or Demur, especially the Court being divided: Also the deteining the Kees of the Church by Spiritual person, or whereby any Spiritual person is hinderd to enjoy his Office, is a Spiritual Offence; but in hindrance of a Lay-Officer, as Commissary, &c. its a Temporal Offence.

Sir John Jacksons Case. Ante.

TOurner on Ognells Case 3 Cr. 164. and Trussels Case 3 Cr. 516 prayed, that he might be charged in an Action by Affidavit, affirming he could not be taken: but the Defendant lay in Prison for him, 1 Cr. 389. Stephensons Case; the Court conceived that eundo or redeundo to the Court, or the Chief Justices Chamber, they ought not to grant leave to any to charge any; but by Windham, Co. Entries, Error, the Court may give leave to charge person Attainted or that lieth in Prison for Crime; and so ought. Sed Curia contrà, they ought to leave Men as they find them free, as well as witness, or party going about his business to the Secondary, and retorning: Also its part of his Judgment, that the party lye without Bail; but if at the Months end he make default of giving sureties of good Behaviour, they will give leave to charge him; and so if there be any practice in him to lye in Prison. (38) Arrest.

The Duke of York *against* Linstred.

JOnes opposed Prohibition, because the Ship was Floating 3 Miles in the Main Sea, and so secured by the Dukes Servants, and a Libel in the Admiral, and a primum decretum, whereby the property is not altered, but only the possession secured; and the sole question here will be, whither Floatsam or not; and the defendant, as Vendee of the Mr. of the Ship, after the Decree on Suggestion, that the Ship was in the River, prayed a Prohibition: Also the Ship is in Custodia legis till the party answer in the Admiralty; also this property is but an incident question, and Floatsam the main, and so the Admiral may try both, but the Sale was before notice of any Seisure, as Floatsam: but this suit was made to avoid the Sale. Also, by Wild, for the Defendant, the Law giveth a year and day to claim the Floatsam: The Court agreed, that Floatsam properly belongs to the Admiralty, and they may try whither it be so or no; but this Suggestion being of a Dereliction within the Body of the County, it ought to be tryed by Jury, and the Decree in the (39) Admiral. Siderf. 178. pl. 9.

Admiralty will be allowed a good Plea in Trover for it: Also, by Windham, Floatsam is that which is totally derelict, not that which is avoided in the Sea for fear of danger, to which the owner hath still an Eye, and only goeth out to pray help, which Twisden agreed: But this is triable by the Admiral. Also the Claim of the property by the party must be in the Admiralty within the year and day. Keeling conceived, that Floatsam within the County is of the Admiral Jurisdiction, divided with the Common Law, but here an owner appears, within the Record within the year and day, therefore they ought here to demur, or take Issue on the Suggestion. So on Libel of fact done super altum Mare, the party may have Prohibition on Suggestion, that it was done on Land; and so if on the Trial his Floatsam be found in corpore comitatus, the Prohibition is good; but if it be found done on the Sea, the Court will award Consultation. Twisden, Keeling, and Windham conceived, that in Causes where the Ecclesiastick Court have no Jurisdiction, a Prohibition ought to go de Jure; But by Hyde, its in discretion, and that Windham agreed, but only where they never had any Jurisdiction; as if once they had, but now have not, its in discretion; but Windham and Keeling being for the Prohibition, and Hyde and Twisden against the Prohibition, except only quoad Corpus Comitat', no Prohibition was awarded, but only as to the Fact in Corpore Comitatus.

Tremain *against* Sands.

(40) Error. PEr Curiam, an abatement of Writ of Error by death of parties, or of Chief Justice, or by act of Court, doth not hinder, but that the second Writ be a Supersedeas.

(41) Costs. THe Court refused to bind the Prosecutor in an Action Tam quam in Recognisance to prosecute with effect, and pay the Costs of the Defendant, as is used in the Exchequer, although moved to it by Williams.

(42) Costs. NOta, the Court refused to remit Costs on Nonsuit ad motionem Paulet, although it were caused by two Witnesses that were since perjured in the point, they proved, viz. that J. S. whom they said to be dead, was alive.

The

The King *against* Townsend. Ante.

Wednesday, Febr. 3.

THe Return was, that the Defendant contrary to his Indenture (which was enrolled according to Custom) had married within two years, and that afterwards he took Wages, rather as Journey-man then as an Apprentice, which, by Holloway, is ill, in that its not positively averr'd that he served as a Journey-man, but only potius, &c. Also if a married man bind himself an Apprentice, he ought to be made free; which the Court agreed, and awarded Mandamus to admit him. Nisi. (43) Trades.

Sir Charles Stanlyes Case. Ante.

THe Chief Justice conceived all Actions laid on a person attainted are to be discharged, but not Executions on Judgment had before; for although the Court will not give leave to lay on such Executions, yet they will not discharge them, because then he can never be taken again: But by Windham, the person cannot plead his Attainder in barr of any Action, and therefore they ought not to be discharged, but the party may be punished for laying them on without the Courts leave, which Twisden agreed. Adjornatur. (44) Priviledges.

The King *against* Brewin.

Mich. 14 Car. 2. Rot. 263.

EAkins moved to quash an Indictment for using a Trade contrary to 5 Eliz. not having been an Apprentice in the Trade of Cooper, which is no Trade named in the Statute: And this Indictment is not grounded on the clause of any Manual Art or Mystery now used in England, but on Sect. 3. the clause of departure out of the City without Testimonial and Retainer, &c. Adjornatur. (45) Trades.

The King *against* Hereford. Ante.

(46) Mandamus.

THE Court, Keeling abſente, conceived, that the Return nunquam debito modo admiſſus, as in the Caſe of London, 8 Co. was good, and goeth only to the Cuſtom and Uſage of the City, not whether he were legally admitted, the Law is not hereby left to the Jury: But however, by Twiſden, the legality of Admiſſion may be directed by the Judge before whom the Trial is; and it may be that he never took his Oath, as he ought, by their Charter before Admiſſion, and adjudged the Return good, debite or debito modo.

Cockman *against* Symonds.

(47) In Eſcape, Br. 37.

March. 92. pl. 157.

IN Debt on a Judgment, the Defendant pleaded that the Plaintiff took out Capias againſt him, and arreſted him, and thereupon, that he was diſcharged by Protection ſhewed, allowed to the Bailiff as Servant to the E. of Bath, not ſaying infrà Menia, but only in his Affairs: To which the Defendant demurred, becauſe Privilege is not allowable to an Execution, 1 Inſt. 131. alſo it ought to be under the Great Seal: But Curia contrà, ſuch Protections being cum Clauſula volumus only, but 4 Inſt. 23. Latch. 48. by Raymond for the Defendant, the Law doth take no notice of the Servants, and therefore he ought to have a Writ; alſo this Writ cometh too late, being purchaſed after the Teſte of Capias; but per Curiam, this is meant of general Protections, not of this Superſedeas of Privilege, Dy. 59. b. pl. 17. But the Court conceiving the Plea in barr naught, they waived the Replication on 1 Cr. 75. and by Windham & Curiam, it's no ſufficient Plea that H. was taken in Execution, and ſuffered to eſcape, the party hath election to begin de novo by Action on the Judgment, or againſt the Sheriff, unleſs he be ſet at large by the parties aſſent; So 1 Cr. 240. pl. 282. Robinſon *againſt* Clayton, & 1 Cr. 255. Mayſon *againſt* Clayton, pl. 299. accordingly; for the Sheriff may be dead, or inſolvent, and the party might elſe have advantage of his own wrong in breaking Priſon.

Judgment for the Plaintiff, Niſi.

Pinkard

Pinkard *against* Lawrence.

Pasch. 14 Car. Rot. 245.

STroud Jun. prayed an Amendment of a Judgment in another Term, which in entring the Special Verdict in Debt on a Bond, was made quod Plaintiff recuperet debitum (ad Damna for) ac Damna, &c. which was granted per Curiam, Keeling absente. (48) Amendment.

Dimmock *against* Hanson.

WHereas the Defendant had spoken Treasonable words of the Plaintiff to Oliver Protector, there was in 1661. a Submission to Arbitrators, who awarded the Defendant to pay Mony at South Kine prædict. no such Will being mentioned before: But, per Curiam, it's needless, prædict. being void, South Kine shall be intended a Will: Also it was alledged by Pelham, who had demurred to the Replication, that the Matter is pardoned by the Act of Oblivion, and so no ground for the Award; but Curia contrà, for the Defendant may be one of the persons excepted. Judgment for the Plaintiff, Nisi. (49) Arbitrement.

Bleke *against* Grove. Siderf. 175. pl. 8.

IN an Action of Battery, the Defendant pleads that the Plaintiff was his Servant, and for negligence in his business he corrected him, & ulterius the Plaintiff also had released, not saying by Deed; for which cause the Plaintiff demurred for doubleness, alledging such Pleas as are in Abatement to be so, 11 H. 4. 10. b. by Thirning, where neither are sufficient barrs, if distinct matters on which Issue may be taken are offered, 3 H. 6. 31. 9 H. 6. 61. b. 15 Ed. 4. 1. b. the reason of which is 40 Ed. 3. 45. per Thorpe. Twisden conceived an ill Plea none at all, as this at Bar is, without shewing the Release; but it's double: So by Windham, it's a plain double Plea, without offering it by writing; for if it be such a Plea, as if it were sufficiently set forth would be double matter, although an insufficient Plea, it's double: And by Twisden, Plea generally quod exoneravit is good, before Assumpsit brought, but after it must be alledged for Special Cause. Hyde agreed it's double, and both, if true, good Pleas. Judgment for the Plaintiff, Nisi. (50) Apprentice.

Pain

Pain *against* Foster.

(51) Covenant. IN an Action of Covenant for not repairing a House, the Defendant pleads performance, and after Rejoyns that he was ousted by a Stranger, which, per Curiam, on demurrer of the Plaintiff, is a departure. Judgment for the Plaintiff, Nisi.

The King *against* Arundell.

(52) Church. THe Court refused to quash an Indictment for disturbance of a Minister in burying a Corps at Exceter, till pleading: But because that it was said the Defendant had by Riot hindered the Parson to use the Common-Prayer Book of 1 Eliz. 10 Decembris, 14 Car. 2. which being since a late Act that enjoyns the use of another Act of Ed. 6. the Court held it ill, although it doth not conclude contrà formam prædict. Stat. (as is the conclusion in case of private Statutes;) but contrà formam Statuti in hujusmodi Casu inde edit. & provis. which is used in general Statutes; but because an offence appeared, the Court would not discharge the Defendant, but ordered him to appear and answer a new Indictment before this be discharged.

The Lord Molineux *against* Nelson.

(53) Error. IN Scire facias ad audiendum errores, and Scire facias Returned, & quod præmonitus non venit, the Court without pleading will examin the Errors, and here Reversed Judgment by Confession for want of Original and Warrant of Attorny in C. B.

Lucas *against* Harlow.

(54) Administrator. IN Error of a Judgment in C. B. in Debt on a Contract, the Defendant pleads payment at a place certain: To which the Plaintiff replyeth Non solvit ad locum, and so the place, which is not material, but must be alledged pro forma, is made material by the Plaintiff, for whom the Verdict is found; and therefore it's Error, by Jones for the Defendant; and there ought to have been a Repleder in C. B. which the Court agreed, had the Defendant specially demurred; but after Verdict it's well enough, payment for the matter being a sufficient Plea: So by Twisden on fully Administred pleaded, the day of the Writ purchased, if the Plaintiff replys Assets the day of the

the Writ, if Verdict be on Issue, its good enough, without saying nec unquam postea. Judgment affirmed, Nisi, and the common difference is, when such Issue is insufficient for the matter, and not only in the Circumstances and form as here.

King *against* Thomas. Ante.

Thursday, Febr. 4.

(55) Wales. Siderf. 179. pl. 15.

WIlliams Senior for the Defendant, reflected on the auncient Constitution of Wales, which in its Original, was an absolute and undependent Kingdom; and by the Saxons, they were made tributary and feodatary, since which, it was said held of the Crown, as Calvins Case, and Pl. Com. 129. but not parcel of it: Then by the Normans, William the first, the Marchers were set up, not only in the Countries, but in the very Body of the Kingdom, in most Counties, except those that were Auncient Welsh Counties, which knew no such Name as Marcher till his time, although they were extended to the Severn, and Governd by the Malmutian, which were their Common Laws, as also the Laws of Howel-Dah An. 928. but the Lords Marchers set up another Arbitrary Law, and confined themselves not to these, 12 Ed. 1. A new form and Reformation was made of their Laws, but no provision is made for Criminal Matters, but they remained according to their Auncient Usage and Laws, till the Union: But there have been several Chief Justices made, and Commissions Issued to try Felons, from the King of England, but by the Union, 26 H. 8. it was provided, in respect of the Marchers partiality, that all Felonies and Murders tried there, and Acquittal had, or Fine made, shall be no Bar to a new Trial in the next English County within two years, Pl. Com. 79. I agree that there doth remain a Concurrent Jurisdiction, but the Cause of Acquittal goeth only to Trials in the Court of the Marchers, in that its said, Or Fine making, which never was in any other Court. Also had the King sent a Commissioner to try any Felony there, if he had been acquitted, he could not have been tryed in the next English County. And by 27 H. 8. 26. the Courts of the Marchers is taken away, at least as to their power of Life and Death, although their Temporal Power may remain. Also Wales are by 27 H. 8. to have the same Immunities as English born, who on acquittal cannot be Tried again. Also 34 H. 8. doth confirm a power of Trial, if the next County be possest of the Cause;

Cause; but there is no Clause that gives Trial after acquittal: Also this Statute doth Erect a Grand Sessions, with power to hear and determine, which they cannot do, if after acquittal he may be retried; and there is no President of any such Trial since this Statute: Jones for the King, the Preamble of 26 H. 8. giveth light to the cause of its making, which was to prevent the Contempt of the Welsh, in not Dreading the Laws of England (to which they were then subject) and to inflict a punishment on the people, not on the Lord Marchers only; For in the next clause the people are commanded to apply to the Marchers Courts. Its true; the cause of acquittal here mentions only the Marchers, but the subsequent Acts speak generally of Trials in Wales, and there is not pretended, that by any clause of subsequent Statutes, that do expressly repeal the clause of acquittal, and that they do not impliedly take it away, by taking away their Jurisdiction and Dominions, is apparent; for the places that before the Statute of 27 H. 8. were Marchers, do still retein their Franchises and Liberties in Reputation. Also Monmouth is by this Act made an English County to all intents, and the Kings Writ runs there, and such Trials and acquittals must be where it runneth not, 3 H. 7. cap. 1. is almost as sharp as this Law, that giveth an Appeal within a a year, notwithstanding a precedent acquittal on Indictment: Also this clause is remembred and continued by all subsequent Acts of Parliament that concern Wales, and 27 H. 8. doth expressly say that nothing shall be derogate from 26 H. 8. As to the Trial of Murders, which being the most common Phrase and Term to express, as well the Trial as acquittal, and all things dependant thereon; but 34 H. 8. doth by new enacting clause (not only by Proviso) expressly and fully Establish this Trial of Murders in the next English County, and every Article of 26 H. 8. Also the saying Fine making, doth refer only to the Indulgence of the people, who often found the offences less then they were, and so caused only a Fine: But, by Keeling, its perfectly pointed at this Court of Marchers by Fine making, which Acts are the Acts of the Judge, not of the people. Also by Twisden, the Confirmation by 34 H. 8. is not of every Article in 26 H. 8. for then the Marchers would be up again still; but it confirms all Enquisitions and Trials, which before could not be of Facts in several Counties, and every Article thereof: But nothing more contrary then to say, this extends to the clause of acquittal. Twisden & Curia conceived that Wales were Subject and Tributary in the Saxons days, as Spelman and Math. Paris. Adjornatur.

The

The King and Patrick *against* Queens Colledge. Ante.

JOnes for the Plantiff, that the Return is insufficient, containing no answer to the Writ, which commands the Fellows to admit, or shew cause why they did not admit; and they Return only that he did not appeal, which is no cause, without saying the Election was controverted, or that another pretended right, like 34 H. 6. 31. or that it was void: But admitting the Return to the Jurisdiction, as (if any thing) it is, then as it stands at Common Law, whithout the Letters Patents of King James, so its no more but Licence is given to Erect a Colledge ad Studend. & Orand. without any Special Visitor, in which case, according to the Resolution of Bags Case, this Court hath Jurisdiction 11 Co. 97. as Reformers, as well of private, as publick injuries; for the Law doth not make the founder Visitor; or if it did, there is none here, The Line of Quæn Margaret, Temps H. 6. being extinct, and the Return shall not be taken by Intendment, as Plea, that H. was seised in Fee, which shall be intended to continue, because the other party may answer thereto, as they cannot do to a Return. 2. The Ordinary cannot be Visitor, unless appointed by the Foundation, nor was it ever pretended in any University; also the Letters Patents of King James were added, as a supplement, not to take away Jurisdiction which the Law Established: Also whereever the head of any Corporation is Elected, and cometh in without consent, or appointment of the Ordinary, the Ordinary hath no right to Visit, be it Spiritual, as in F.N. B. 42. B. of an Hospital, or F. N. B. 52. B. a Free Chappel Founded by a private person by Donation, 6 H. 7. 14. pl. 2. or a Dean, Premunire Br. 21. which is a donative, or of an Abbot, who is visited, or not according to the manner of his coming in, if without Institution of the Ordinary, 9 H. 6. 32. b. pl. 3. only by Elections of the Monks, the Ordinary cannot Visit, Or. 2. Be it Temporal, which our Case appears (for ought is shewed to the contrary) to be, for the Or. is not bound to be a Spiritual person; a Free-School or Work-House is as much bound ad orandum as Colledge, and therefore by the Common Law this Court hath a proper Jurisdiction. 2. As to the Letters Patents, they make no alteration, having no restrictive or negative words, as in the Statute, that saith all Informations shall be in the Court below, had not excluded these Courts without the words (and not else where) and so in the common case of Grant of Co-

(56) Mandamus.

Hospital: Poult. §. 1.

So is 11 H. 6. 29. b. pl. 15.

nuſance of Pleas. 3. Its not Incident to the Office of Vice-Chancellor to Viſit, for the Chancellor is to do it by the Patent, or to make ſome ſpecial Deputation, which is not here mentioned: Alſo there is more reaſon to grant Mandamus to ſuch Corporation as this, which concerns many perſons immediately, but far more in Conſequence then a Mayor and Fiſherman of a Petit Town in Cornwell. It might have been objected to Bags Caſe, that there was no preſident; alſo to ſay it lieth not for a Schoolmaſter, I agree, if only by Licence, but if uncorporated, it lieth well enough; alſo the reaſon of this remedy is for Corporation, whereof one Member cannot ſue the reſt, but Sole Corporation may have an Aſſize. Finch, the Kings Solicitor for the Colledge, the Writ doth ſuppoſe Dr. Patrick out of his place, which the Return agrees; and therefore to ſay he hath not appealed, its ſufficient as to the Matter. I take it as a Rule, that wherever the Foundation be Elymoſinary, be it Spiritual or Temporal, the Ordinary of Common Right is Viſitor, Linwood verbo Ordinarius cap. de religioſis domibus, except Hoſpitals, of which by latter Statute, the Chancellor is made Viſitor: This is a right unalterable; but if it were not here, yet the Founder is Viſitor, whoſe Line ceaſing, the Right, for preſervation of Peace and Order, devolveth on the King, and from him paſſeth by the Letter Patents, and till Appeal, to ſuch an Ordinary as the Law appoints: None can come hither per Saltum, nor can he come then; be but the Sentence of the Ordinary a droit ou a tort, 13 Jac. Huntlyes Caſe in Evidence to a Jury in Ejectment, its binding, as of Deprivation, Foundation, as of Magdalen Colledge, that is abſque appellationis ullo Remedio, do not exclude an Appeal to the Viſitor appointed by Law, as was reſolved betwixt Price *againſt* Yarbery laſt Vacation in the Councel, præſente Rege, Judges, and many Civilians, 4 Inſt. 340. But this is meant, that the Appeal ſhall not have the ſame Effect, as elſe it would, i. e. ſo as to ſuſpend the Sentence, or annul any mean Acts betwixt the firſt Sentence and Appeal, and it is celeberrima voluntas Donatoris, that he be Viſitor whom the Law appoints: Alſo the ſtopping of the Mandamus is the beſt way to preſerve the Government of the Univerſities, and the Fellows have as much right to this Writ as the Head; and this is the way to entitle the Court to all petit Controverſies in Univerſities, which is below the Dignity of this Court. In the Caſe of Lewis and Day, the only queſtion was, who was the proper Viſitor only. Keeling ſaid Huntlyes Caſe was diſcontinued, and never adjudged in this point, which

the

the Court agreed. Windham conceived it no good Rule, that this Court may reform all abuses, but that the King, as the Fountain had divided the Streams from which one cannot Appeal to the other: And doubtless, here the Ordinary may intromit; but the doubt is who is the Visitor that should put in a Fellow, not who shall Judge of his Deprivation when he is once in. Keeling conceived it was never pretended that Election of Master of Colledge was of Spiritual Cognizance, and unless this Court may restore, or send Writ at least, to know why H. is not restored, there would be a Jurisdiction of which the King hath no cognizance. Also as well as the Court may expound Will of the Testator, so they may the Will of the Founder: But Hyde contrà; a Colledge is founded by the Kings Licence. Twisden conceived the King, in this case, Visitor; but, by Keeling, not qua Founder, but qua Rex, for the foundership was in privity; but by Windham, where the Foundation is Spiritual, it comes to the King, as Supream Ordinary, not into B. R. Adjornatur.

Sir George Sands. Siderf. 179. pl. 13.

Mr. Solicitor prayed a Prohibition to the Prerogative Court to suit for Repeal of Administration taken by the Father on the Death of the Son; and eight years after, one Peck, as Wife to the Son, now sueth for Administration to him, on 21 H. 8. 5. for that the Ordinary hath Election to grant it, to which he will; and having executed his power to one in æquali Gradu, as in one Browns Case hath been adjudged before the Delegates, he cannot cite the party after to Repeal it: and Rosier *against* Langdale, in B. R. it was adjudged, that the Ordinary hath Election, to which he is to be remitted only, and not to any right. Twisden conceived a Prohibition would lye on Fotherlyes Case, Hut. and 1 Cr. 62. pl. 68. Adjornatur. (57) Administrator. 3 Co. 40. So of the Mother.

Mourch *against* Laund. Ante.

The first Venire being not Filed, the Court conceived that the Plaintiff may take out another Venire Facias, Stellyman *against* Aylet was resolved by advice with all the Clerks: But if it had been Filed, it could not be changed: but, by Keeling, its a practice sufficient to set aside a Trial, for H. to take out the second Venire Facias without Filing the former, when he Returns it, but just before (58) Trials.

fore the Assize below, which the Court agreed also, and referd it to the Secondary to examine.

The King *against* Gascom.

Friday, Febr. 5.

(59) Force. SYmson prayed an Indictment of Forcible Entry, being taken apud Bedford intra Jurisdiction by Justices assigned to keep the Peace, infrà villam de messuagio infrà villam, it might be quasht: But Windham and Keeling, this being a private Sessions, Enquisitio capt. &c. they conceive it ought not to be said tent. pro villa, no more if it were ad General. Sessionem: But it was agreed, that General Sessions of the County ought to be said pro comitat. and so, by Twisden, it ought here, although a private Sessions. Adjornatur.

Winwood *against* Totte.

(60) Assumpsit. IN Action upon the Case, in consideration that the Plaintiff would forbear the Defendant a Month next ensuing the promise aforesaid, no promise being before mentioned, the Defendant promised to pay, which, by Williams, in Arrest of Judgment, is void: Yet the Count was on Indebitatus of the Defendant to the Plaintiffs Wife dum sola, and that the Plaintiff and his Wife intending to sue the Defendant thereon, the Defendant promised prout, &c. The Court agreed this void; but by the Record it appear'd to be next ensuing the promise of the said Defendant superius mentionat', which is well enough. 2. The consideration was, if he would forbear, whereas the cause of Action is by the Wife, who must be joyn'd; and she, if surviving, may sue for the debt de novo: But, per Curiam, this is a good Plea in Bar that the Husband hath Recovered, although it be Collateral, and, so its a good consideration.

Judgment for the Plaintiff.

Fourd

Found *against* Welden. Ante.

HYde on Conference with Eveſque London, ſaid, That this place Walden is one of the places that is part of the peculiar of the Archbiſhop, and ſo the party is not cited out of his Dioceſs: But the Suggeſtion being that the Pariſh is Great Walden, and out of the Dioceſs of the Archbiſhop, the Court ordered cauſe to be ſhewed why a Prohibition do not go, ex motione, Keeling, who prayed Attachment for proceeding contrary to a former Rule of Court, although the Court had been divided after. (61) Ordinance.

Siderf. 178. pl. 12. Baxter *againſt* Jackſon.

IN Action upon the Caſe againſt the Defendant on promiſe quod warrantizaret pecuniam due by J. S. in conſideration that the Plaintiff would carry Beer to the Houſe of the Defendant, it was aſſigned for Error of Judgment in the Marſhalſea, that the Plaintiff hath not ſufficiently entitled himſelf. 1. Becauſe he hath only averr'd the mony not paid by J. S. and not that the Defendant had not warranted it, which by Barwell he ought to do, as if it had been that he would ſecure, the Breach ought to be that he had not ſecured nor warranted; but had it been that the Defendant would ſee the Plaintiff paid, or had warranted in præſenti, then Non-payment had been a ſufficient Breach: Sed Curia contrà, that it's well enough. 2. The averment is only that he delivered it to the Defendant, and the promiſe is to carry, which being to the perſon, and not to any place, it's well enough per Curiam. Judgment for the Plaintiff. (62) Aſſumpſit.

Paul *againſt* Kent.

IN Action upon Indebitatus infrà Juriſdict. of the Marſhalſea, for Wares and Merchandiſes prius venditis, not ſaying ad tunc & ibidem, or where, which was aſſigned for Error: And Judgment reverſt per Curiam, Niſi. (63) Lieu.

Sir

Sir George Binion, &c. *against* Robinson, &c.

(64) Rent. IN debt for Rent against Assignee, who pleads non est factum, which 21 Ed. 4. 4. is held void, notwithstanding it is not specially assigned for cause of demurrer; and 10 H. 6. 7. riens passe per le fait is held naught: And, per Curiam, Estranger cannot plead Non est factum. Judgment for the Plaintiff.

In Denizen, Br. 7. Collingwood *against* Pace. Ante.

Saturday, Febr. 6.

(65) Alien. BAron Atkins for the Plaintiff in the Exchequer Chamber, That the Heir of one Brother shall inherit the other, although the Father be an Alien, for he hath Sanguis Civilis, although not Naturalis: And to be born in England is not sufficient to make any inheritable, if the Father were not also born within the Kings Legiance; nor need the Brother in this case mention the Father in his Conveyance, but only for pedigree, Littl. Sect. 24. also as Littl. Sect. 708, one Brother may be Ancestor to the other, as well as the Father: So 1 Cr. 434. Broadstock *against* Scobell; so Edwards *against* Rogers, 1 Cr. which Reasons are sufficient answer to Cokes Opinion, being here only as Commentator, & præter Textum, Denizen, Br. 9. The King by Patent cannot make an Alien inheritable; so 1 Inst. 84. 129. and the difference betwixt Alien and Attainder is none, (King *against* Boreston, Noy 168, the same with Hobbies Case,) but if there be, it's strongest against the Attainder; and in that Case it was put by two Judges, that the younger Brother may inherit the elder, notwithstanding the Father be an Alien; but it was denied by Serjeant Leonard then, but I rely on the Case of Godfrey and Dixon. 2. Patrick the elder Brother being an Alien, can be no impediment to the Heir of the youngest to inherit the middle Brother, being as non ens & impedimentum quod in Jure non fortitur effectum, also à privatione ad habitum non datur regressus. he hath no privilege himself, 42 Ed. 3. 2. and so cannot hinder any that hath, Dr. & St. 7. 22 H. 6. 28. and the difference is betwixt Natural and Civil or Hereditary blood, that is disabled by the Fathers being an Alien, but not this by the Brothers being so. 11 Co. 1. The Lord Delaware, the younger Brother, sate as Peer, the disability of the elder being not only accidental or temporary, but perpetual: Also the words of

of the Act of Naturalization are full in the enabling part, and not relative only, as is objected, being Electio Regis Patris Regni de aliquo in subditum suum Jure adoptionis, and therefore these Acts of Grace must be so construed, as may effect such intent.

2. Hales Chief Baron for the Plaintiff, dismissed first as plain, That neither Robert, Nich. or the discendents of Nich. or William can put in for any claim in this case, their Father being an Alien, although dead; nor shall William the Son of Nich. be any impediment: But I conceive it will be the same Question, Whether George shall Inherit to John Earl of Holderness, as if the Son of George, who is Jure Representationis, shall inherit. By the way as premise, there are three terms to be cleared: 1. The term of Inheritance or Discent; in which is to be considered, 1. What is to be their Rule and Measure, which is not the natural love of Parents to Children only, because the Laws of every Country hath expounded those according to the Laws of the Country. In the Sacred Law the Father might as well succeed the Son, as he to the Father; and by the Civil Law, the Father, Brothers and Sisters succeed. By the Laws of Norway, the Father succeeds not if his Son hath Brothers or Nephews, but only preceeds any Uncle; and therefore, when we examine any discents in England, it must be by the Laws thereof. 2. What is the division of discents, which is lineal or collateral, both either sine medio, as betwixt Father and Son, or Per medium, as Grandfather and the Son, Lit. Co. 10. b. or betwixt Uncle and Nephew, 17 Ed. 4 5. or contrà, it's a mediate discent, not in respect of the degree, but in respect of the mean of the discent; for if Father be dead, the Succession to the Son is immediate; but the right of discent is mediante patre. In the immediate discent there can be no impediment, but it must be in the persons themselves, as Attainder or Alienism of the Father, quoad the Sons: But in mediate discents, if there be an impediment in the medium, it will hinder the discent, as of the Father, the medium deferens betwixt the Grandfather and the Son, or betwixt the Uncle and Nephew, and therefore his Attainder or disability shall hinder the discent, although both extreams be able; but in our Case the Father is not the medium betwixt the Brothers, and so Noy 163. his impediment is none to the discent of one to the other. 2. For the disabling term of Alienship, most certainly it doth not hinder, but that his Son or Brother is as much a Son or Brother, as of Denizen in Regno Naturali, but in Civili there is a difference in the Common Law, which 21 H. 8. 1 Cr. doth allow Alien to be next of

Vaughan 242. 1 Andr. 273. vide in re & tempore. 19 H. 6. 61. per Forteseue. 2 Inst. 288.

Kin-

Kin. This disability is either personal, which as to discents is not favoured; for though he may contract or purchase till Office found, yet he cannot transmit any thing by discent, nor doth the Law allow him to take any thing as such, as to be Tenant by Courtesie, or Tenant in Dower, the Law will never give him what it doth not enable him to retain, and therefore he cannot take by discent; he is taken notice of as person non existens, as person attainted is. 2. For the consequential disability ponere obicem to the hindrance of another, as the Father Alien dieth in the life time of the Grandfather, leaving a Son a natural Subject or Denizen, although the blood of the Son be not corrupt, yet because the discent is mediate, the disability of the Father doth hinder his discent, Ed. *against* Rogers, 1 Cr. 543. is quite out of this Case, there being a wide difference betwixt a disability and a barr, 1 Cr. 435. both are alike; and although the Fine will not barr the Uncles Son being Estranger, yet if the Uncle (as Appeal, Br. 104.) had been an Alien or Attainted, it would have barr'd. The third term is the Naturalization, which is Restoring, and removeth the personal impediment, which Denization removeth only in part as to issue after, not of what was before, nor cloatheth them with any hereditary power, but the Naturalization is more intire and intimate. The French King may naturalize, but not to the prejudice of him that was a Denizen before. By Naturalization an Alien Son of Denizen being made in vita patris, he shall inherit. So in Godfrey and Dixons Case, had the Naturalization been pend as ours is, it would not have devested the discent before happened, although by particular retrospect it might have devested the discent, but it shall not by construction devest any discent or escheat actually vested. 2. As to the Naturalization it self, which is to be used only as an Explication to let me into the Question in hand, but is not any distinct point; Johns was in 1 Jac, when he had no Auncestor Lineal or Collateral; George's was, 7 Jac. when he had some kind of Auncestor, viz. John. Before their Naturalization there could have been no discent betwixt them, by reason of their personal disability; and although they had had none, yet by reason of their Father Roberts being an Alien, admitting there be a consequential disability, it is not removed by this Act of Parliament, but only the personal; the Reasons are, because there was a disability in the Brothers that was personal, which may satisfie the Act, therefore it's not necessary it should be wrong, so far as to take off the consequential disability; but if John had been a Denizen, the Act could not have been satisfied without taking off the consequential disability.

bility. 2. The Act takes no notice of the Fathers disability, but only of the disability in the Sons, which is personal: And 3. The Scope of the Act is only to carry the benefit unto the Sons, and their Children, not to their Father, or Grandfather, as if they had been born in the Kingdom. As this Naturalization is, it is not applied wide enough to cure all defects by Alienship, but only as to the Brothers, who by the Act are as much Liege people as Subjects born, although the Father be still an Alien: And the Scope of the Act is, that they be as free as any born in the Kingdom, (not that their Fathers, or Grandfathers, shall be so:) So to be inheritable to any Ancestor, being a general clause, doth make things as found, not that are not: so that if he hath no Ancestor he cannot inherit: Also none will say that by this Act G. may inherit to Patrick, who is a Denizen, because his Father, Nicholas was an Alien, the scope of the Act is only to make him inheritable to such Ancestor, as if he had been natural born he might, and no other; there might be reason enough for the Resolution in Godfryes *against* Dixons Case, without laying any stress on the Act of Naturalization, as some of the Judges then did. As to the question in our case upon the Verdict, it must not be intended the Wife is a Denizen, in which case her Blood would be sufficient to make an Hereditary Transmission betwixt the Brothers; the Issue of English Woman, by Alien beyond Sea, are Aliens, because she is sub potestate viri, and the Husband is as a mean betwixt the King and her; but Issue of Alien Feme by English Man beyond Sea, is Denizen. Its said, the Husband in our case was an Alien; and he shall be intended to reside there, unless the contrary appear: But however, on full Examination of Cooks Opinion, on Lit. 8. I do conceive one Brother shall inherit the other; the discent betwixt the Brothers is immediate; the consequence whereof is, that if there be no impediment in themselves, no impediment in any other will hinder: That it is immediate is Evident, in that from Brother to Brother makes but one Degree. as 1 Inst. according to the Common Law, although by the Civil Law they are in the second degree, which being Collateral obtinet vicem primi. By the Grand Customary, no such discent collateral can go beyond the seventh, computing according to Cannon and our Common Laws, Lit. Sect. 20. Gard. F. 116. as in Frank-Marriage, which looketh not on the common Root in the Father, but immediately leap and transire from one Brother to the other. 2. The discent betwix Brothers, differs from all other collateral discents; for although a Bro-

ther of the Half-Blood, be nearer, as Browns Case, and to be preferd in Administration before Brothers Son of the whole Blood; also such Brother of the Half-Blood, hath more Bloods in him then the Uncle; yet the Law will rather carry the discent to him, though he hath but half the Blood of the Nephew, because this is no discent Mediante patre, but an immediate discent. The due comparison of Courtnyes Case 3 Co. and Hobbyes Case, and Grayes Case, Dy. 274. will clear these reasons, 17 Ed. 4. 1. Also if the Natural Blood be well derived, the Hereditary or Civil Blood is superinduced: As if Alien hath Issue by English Feme, none doubts but such Issue may inherit one to another; yet upon the reason objected, they should not, for they derive no civil Blood from both, but only from the Feme, and so they are but Half-Brothers; so if Grandfather and his Feme were Attainted, it hinders not, but the Son may inherit the Father; yet is not the Hereditary Blood derived from them, but superinduced by construction of Law. This was the reason of Hobbyes Case, where the Mother not being Attainted, the Obstacle of the Fathers Attainder would not hinder; yet if such Attainder were an Obstacle in its own nature, as 49 Ed. 3. 12. the Blood of the Mother would not preserve the discent, because the Blood of the Father shall inherit to the purchaser and the true reason of this case was, because it was an immediate discent; and the Father only the medium deferens sanguinem, not hereditatem. And Laws have in all times been tender of extending this Disability farther then it needs must; but as in Bacons Case, on 25 Ed. 3. have always made favourable Interpretations for the Denization, especially of Birth or Naturalization, although Denization by Patent would not be sufficient, and many Postnati in England have inherited to their Brothers Antenati in Scotland; and therefore, as far as by Warrant of Law I can, I will shew favour. Our case differs from that of Godfry *against* Dixon, in the reason of it, whither the Naturalization have retrospect to the Birth of the Brothers, or whither only it refer to the time of Naturalization.

Judgment for the Plaintiff.

King

The King and Hurst. Ante.

Monday, Febr. 8.

THe Court conceived an Attorny in Corporation, being but a private Profession, no such Officer as is removeable by the Act 13 Car. 2. of Corporations; and if he were, its insufficiently Return'd that the Commissioners made an Order only to the Mayor to remove him, and he did it accordingly. Restitution awarded, Nisi. (66) Attorny.

The King *against* Starling, &c. Ante.

KEeling was of Opinion for the King, that this bare Conspiracy is a great Crime, where it is to do that which is evil, although to private person; so is the Poulterers Case; but 26 Ass. 44. what ever concerns the Kings Revenue is publick: And for this cause a Monk, 2 H. 4. 7. pl. 26. by being Former is thereby made capable to sue. Also this impoverishing the Fermors, cannot be intended otherways then in that whereof they are Fermors; and the loss of the Kings Revenue is a necessary consequence, which the King in favor of his people hath accepted in liew of Wards and the purveyance, which legally were of great value. (67) Conspiracy.

2. Windham conceived it a point of Weight and difficulty, but had the persons bèen found guilty of the whole Declaration, they should have bèen ransomd rather then Fined, because it tends to Rebellion; but we have no Conviction of the crime, as the Star-Chamber, but only the assessing the Fine, and by this Verdict the Defendants are acquitted of an unlawful Assembly, which ought to be alledged Vi & Armis; and for want thereof, many Indictments after Verdict have bèen set aside. Also 2. They are acquitted of Conspiracy, which properly is where its to Indict Men for their Lives, and this is that whereon the Writ lieth; but the false alliance and union by mutual swearing to maintain quarrels, is rather a confederacy also, as 29 Ass. 45. if it were a conspiracy, there ought to have bèen some Overt Act expressed; as if H. be Indicted for forestalling, or being common Thief, or Barretor or Conspirator, and as to this, there is no difference betwixt Indictment and an Action or Information; I do conceive the Defendants found Guilty of Confederacy, as in the Poulterers Case; Also the ends for which these crimes are alledged to be done are discharged, as the defeating the King of his

Customs, and pulling down their Houses, except only the depauperating of the customers, whom I think publick persons, and so they appear to us by their imployment set forth in the Declaration, and in this respect we ought to aggravate the Fine, as if the end were to beat a Sheriff as a private person, yet he being a publick Officer, it will aggravate the offence. I agree that general confederacy, without designment to publick or private end, is punishable by Action upon the Case 3 Ed. 3. 19. or by Indictment, in 19 Rich. 2. in Poulterers Case is according; and therefore I do conceive here is enough found to give Judgment against them for a confederacy, by their assembling together, their consultation and conspiracy, which is as much a false alliance, as if they had bound themselves by Oath, &c. But this is cause to mitigate the Fine, that its only private; for 26 Ass. 44. the confederates were ransomed for this confederacy.

3. Twisden ad idem, held them found Guilty of an unlawful Assembly, and of a Conspiracy, and Vi & Armis is not necessary, the offence being particular Misdemeanor, which doth not require it no more would Information for Assembly, for Service of God contrary to Law: Also this Impoverishing of the Fermors, doth implicitly find the diminishing of the Kings Revenue, which is the chief consequent of it; also intent, whilst private, is fluctuating, and so cannot be punished, but when its declared by Act, its punishable; also voluntas non reputabitur pro facto, 3 H. 7. cap. 14. that is, it shall not be punished so fully, but it is still punishable: The false alliance or binding by Oath, is but a farther degree of conspiracy, which is all one, and synonimous with confederacy, and of which the Assembly and Consultation is a sufficient Fact, also the Kings Treasure is publick.

4. Hyde ad Idem, That they are found guilty of Conspiracy and unlawful Assembly, and Vi & armis not material, especially not now the Jury have found it was factiose illicitè and unlawfully assemblaverunt & congregaverunt, which is sufficient for us to give Judgment: Also such Assemblies are punishable because prohibited by Law, although no other Act be done. Old. Mag. Chart. cap. Iteneris, There is one Article to enquire of such as seek to diminish the Kings Revenue of Wards and Marriages, which shews it's a publick Treasure, and the very indeavour and intent to abate it is punishable; and so it were to confederate to deprive J. S. or any private person, of his Rents or Lands, although not so great, Poph. Sir Baptist Hicks Case, (which I vouch, because I heard it, not for the Authority of the Book, which is none) was an Offence punishable,

nishable, although a private Letter, because it tended to dishearten men from publick works of Charity, and to the breach of the Peace; and Moor Scrogs Case, men were censured for a bare Conspiracy (without Vi & armis) to prefer Bill in Chancery against private person without his privity. So Jeffs Case, an Indictment in B. R. for a Libel against the Lord Cook and the rest of the Judges, on giving their Judgment in Magdalen Colledges Case, by which he had loss, and his Plea was Special, and worse then the Libel, and the Court ordered him to set his own Hand to it, and gave severe Judgment against him for the Scandal to the Profession of the Law, wherein Noy vouched Bruses Case, Trin. 18 Ed. 3. Rot. 162. a private Letter to a private person, saying, The four Judges would do nihil inane at the Kings Command; and because this might be misinterpreted, he was fined and ransomed; Judgment for the King: But for the Fine, it must be according to the several persons capacity severally. Adjornatur.

NOta pro Regula, That he that desireth to be made Defendant in Ejectment for so much as is in his possession, must give a Note what the particulars are of which he is in possession, to prevent delay at the Assizes. (68) Ejectment.

The King *against* Farre.

IF one be committed on Criminal Charge, as for Forgery, &c. till Bayl found, he may be charged with Actions; contrà if he were committed by Judgment of the Court on any Crime, which was agreed by the Court. (69) Priviledge.

The King *against* Thomas. Ante.

Tuesday, Febr. 9.

KEeling conceived that at Common Law there was no question, but an Acquittal at the Kings Suit was a discharge against him, but not of the Appeal; and the effect of 26 H. 8. was only to remedy those kind of Trials there used, which were not according to the Common Law, as is evident by the Proviso, That no Acquittal or Fine making in the Marchers shall be a barr, although the Body of the Act say generally, That all Murders done in Wales shall be tried in the next English County, and by 27 H. 8. these Marchers are taken away, and this Clause virtually repealed; and 34 H. 8. doth only confirm the Body of the Act for Trials in the next (70) Wales.

next English County, leaving a concurrent Jurisdiction in Wales and England at the Election of the Prosecutor, but it doth not confirm this Proviso of Acquittal, and therefore the Plea of the Defendant is good. Windham ad idem, conceived Wales a distinct independent Kingdom till made Tributary by the West Saxons, and so have been ever since England hath been a Monarchy; and since Edward the Firsts time there have been Justices of the King there, and a Quare Impedit lieth in the Grand Sessions, and they may write to the Bishop, which the Lords Marchers could not do; and 26 H. 8. made no alteration of the Courts, but rather confirmed them; but that took away that Arbitrary Power which they exercised before Tempore Belli; but 27 H.8. took away the Courts and Places of Marchers, but left their Cognisance as Court Baron or Court Lèet and private Seniory also: If since 34 H.8. the King had sent a Commission to try any that were thereon acquitted, such acquittal is a discharge; and the Act was not made in jealousie of the Welch men, but of the Marchers Courts only: And although the King erected no Courts according to his power given by 27 H.8. within five years, yet this defect is supplied by 34 H.8. which erects the Grand Sessions as the Kings Court. Twisden and Hyde according, that the Prisoner ought to be discharged. Judgment for the Defendant.

Brooks *against* Lake.

(71) Covenant. IN Debt on Obligation, the Defendant pleads Covenants performed; the Plaintiff replys by Breach, in not delivery up of House: The Defendant rejoyns, that before the end of the term, the Plaintiff gave him leave to continue it longer; to which the Plaintiff demurred, and by Twisden & Curiam it's a departure: But the Case was, the Condition was for delivery up of the House, and the parol Agreement pleaded in the barr, which, per Curiam, is well enough, and not like 3 Cr. 697. Hayford *against* Andrews. Sed Adjornatur.

In Departure, Br. 15. Morgan *against* Man.

(72) Arbitrement. IN Debt on Award, the Defendant pleads Nullum fecerunt arbitrium: The Plaintiff sets forth the Award; the Defendant Rejoyns that the Submission was generally of all matters, and there was cause, whereof the Arbitrators had notice, and yet no Award on it; to which the Plaintiff Surrejoyns, that they did make an Award on that thing, to which the Defendant tenders Issue, and demurred generally, which as

as Dean *against* Eason, is a departure, had there been a particular demurrer to it, for Nullum fecerunt arbitrium cannot be after maintained by Award, that is void in Law, but after this general demurrer it's good enough; and per Curiam, if it were not a departure, the Defendant could not take any advantage of such ill form, Judgment for the Plaintiff.

Siderf. 180. pl. 17. Inman *against* Patie.

IN an Action on Indebitatus infrà Jurisdict. for Wares before sold (not saying where) which per Curiam is ill, although the thing be not local, and Judgment Reverst, because it being an Inferiour Court, they must alledge in fact, and not only by implication of Law, that the Consideration ariseth infrà Jurisdict. and, by Windham, such a difference in the locality of the Consideration, as carrying of Tymber, &c. hath been formerly taken; but the Opinion of late is changed, and hath made all one for the inconvenience, that all other Inferiour Courts would follow such bad President of alledging fact, which is never examined there. But by Windham, the party may alledge for Wares before sold infra Jurisdict. which is not traversable; Sed Curia contrà. Adjornatur. (73) Lieu.

In Debt, Br. 94. seu 93. Helliar *against* Casebrook.

IN Debt for Rent against Executors in the Detinet, who pleads an Assignment by them to an Estranger; to which Jones for the Plaintiff demurred, because this is brought only on the privity of Contract, which (Overton *against* Sydall) doth remain notwithstanding the Assignment, which only destroys the Reality, which Twisden agreed; and so had the Testator or Administrator assigned before the Rent incurred, as here, Ironmonger *against* Nusam, Latch. 260. Tr. 3 Car. 1. is so; and Ungle *against* Glover hath been denied, which the Court, Hyde Chief Justice absente, agreed, and no Judgment was in Marrow *against* Turpin, 3 Cr. 75. pl. 39. Adjornatur. (74) Rent. Dyer 247. b. pl. 77.

Barcroft

Barcroft *against* Douty.

(75) Condition. IN Debt on Obligation, Condition, to have all the Debts, and that the Defendant should not Release any in a certain Schedule mentioned; performance is pleaded generally, but doth not set forth the Schedule; to which Wild for the Plaintiff demurred, because as Parkers Case, Co. Entries, he should have shewed what were the Debts in the Letter of Attorney mentioned, and then have averr'd performance de omnibus & singul. & quod non relaxavit, &c. And the mentioning the particulars, averring them to be all, is not sufficient, without setting forth the Schedule. The Court agreed, that in such negative Covenants the Deed need not be set forth; but if some be in the affirmative, as here, it's well enough; for the Condition is to be according to a Letter of Attorney, in which is mentioned that the Defendant should receive all Debts due by several persons mentioned in a Schedule annexed, and that he should not release or discharge any, which is well enough. Adjornatur.

Elliot *against* Richardson.

(76) Assumpsit. IN an Action upon the Case, on promise to redeliver a Lurcher sold toties quoties he should Return; the Plaintiff alledgeth that Dec. 29. after, he came home, and that he did request him, and the Defendant refused: The Defendant saith Postea that the Dog went home, viz. prædict. 29 Dec. the Defendant offered to redeliver him, and the Plaintiff refused: To which Jones demurred, because the Postea referring to the Plaintiffs request, although the same day, it's no answer to the Count without a Traverse, which the Court agreed. But the Postea on reading the Record, appeared to refer to the coming of the Dog to the Defendants custody, and not to the demand: But, per Curiam, as 12 Ed. 4. 4. & 6. the Justification being the same day, needs no Traverse; contrà when at another place, 5 H. 4. 2. pl. 5. & 2. b. pl. 9. Adjornatur.

Scot *against* Goodman.

(77) Dower. AD ostium Ecclesiæ Proclamari feci juxta from. Stat. secundum exigentiam Brevis, Return'd to a Writ of Summons in Dower, was assigned for Error by Jones; But Judgment affirmed by Windham and Keeling, contrà Twisden, & Postea pur auter Error assigned by Jones was Reverst.

Eli

Eli *againſt* Roberts.

THe Defendant Covenants to pay the Plaintiffs and o- (78)
ther Mariners their Wages; and the Plaintiff avers Admiral.
that 5 l. was due for a Month after his departure in the Ship ſuch a day from Blackwall, but avers no notice given to the Defendants of his Return, or going out, nor what was due; for which cauſe the Defendant demurs, and, per Curiam, the Defendant hath bound himſelf, and muſt take notice of it, as well as if it were to do any thing in his own Cogniſance.

Judgment for the Plaintiff.

Richardſon *againſt* Muſgrave.

THe Court agreed that Indebitatus in Inferiour Court of (79)
any Sum of Mony ſaid infra Juriſdict. although the Lieu.
lending be not ſaid there, it's well enough: But on reading the Record, it was ibidem prius accommodat. Judgment affirmed, this being aſſigned for Error in Aſſumpſit.

Alcocke *againſt* Merry.

ERror was aſſigned of a Judgment in the Pallas Court, that (80)
the Venire facias was held on Thurſday, according to Let- Error.
ters Patents, which is contrary to the Patent, which giveth a power only to hold Courts on Friday: But the Court can take no notice of that, nor the tent. die Veneris is not Eſſoyle to ſay the Court may be held any day beſide Friday. Judgment affirmed.

Smiths Caſe.

Wedneſday, Febr. 10.

COleman prayed a Prohibition on 21 H. 8. 5. becauſe he (81)
took Adminiſtration cum teſtamento (which was Nun- Adminiſtrator.
cupative, but reduced into writing according to form) Annexo, he being named alſo an Executor therein; and now one Walmleſy a legatee comes in, and prayeth the firſt Adminiſtration may be repeal'd, which was granted notwithſtanding the Statute pleaded, and probate of the Will Nuncupative, after which, per Curiam, he cannot refuſe Executorſhip, and therefore cannot be ſet aſide; but Sentence being paſt, they conceived it proper to appeal,

because the Original is in the Ecclesiastick Power: But if their Jurisdiction be regulate by Act of Parliament, then when they do wrong, the Court will do them right, by Keeling, by Prohibition; Sed curia contrà; This repellance is a nullity; and the Executors may have Trespass against such Administrator for any Goods, and he can do the Executors no more hurt then a stranger, for such must be named and sued as Executors. And by Hyde, had the probate of the Will in writing been repeal'd, as is often used, there is no remedy but by Appeal, and there is no difference of that from Will Nuncupative. Also by Windham, That there is an Executor named, is a good plea, and issuable, as Gresbrook *against* Foxe; All agreed; that on due Execution of the power of the Ordinary, by granting Administration to the next of Kin, a Prohibition is grantable on Libel by another Legatee to Repeal it; but Prohibition was here denyed.

Siderf. 181. pl. 20. Trussels Case.

(82) Tythes. WIld, the Kings Serjeant, prayed a Prohibition to the Bishops Court of Worcester, because an Executor was proceeded against on death of the Defendant, pendant suit against him there, on 2 Ed. 6. 13. for the double value, with which an Executor is not chargeable, especially where the Debt ariseth ex delicto, and not ex contractu: The Court held an Executor of a Rector may sue, or be sued for the double value. And because the Statute giveth liberty of suit, and Court, and there Feme Covert may be sued, and we will not prohibit, no more will we here, per Curiam, præter Keeling, who doubted because the Executors, as of Hostler for any Delictum, are not chargeable; but the case of Executors of Hostlers is a Quære.

The King *against* Starling. Ante

(83) Conspiracy. THe Court Fined him 300 Marks, and the rest 100 Marks a piece, as the first warning.

Feme A. one of the Executors of Bennet, *against* Baud.

(84) Executors. THe Plaintiff, as Administrator, during the absence of the Executors, and J. S. a Legatee Residuary, brings Action, and avers only the absence of the Executors, which 2 Cr. 590. by Symson in Arrest of Judgment, after general Issue and Verdict for the Plaintiff, is not sufficient, unless all four be averr'd absent: Sed Jones for the Plaintiff contrà, That after

after Verdict, as hath been adjudged of Executors during Minority, not averring the Minority, its well enough: Also his Authority is not determined by the Return of one, unless all Return, and therefore the Averment of absence of three is sufficient: The Court agreed such Administrator not within the Statute of 21 H.8. and Brudnells Case by Windham is, that by the Return of either, the Authority is determined, as Lease during Lives of A. B. and C. Also, by Keeling, this is but a provisional care, and therefore the Court did well to put in the residuary Legatee, who of right in default of the Executors is to have the Administration, which the Court agreed. Sed Adjornatur.

Sir G. Sands *against* Pecke. Ante.

(85) Administration

BAldwin opposed the Prohibition on Administration, Br. 47. because the Father is not next of Kin. Sed curia contra; That Book was denied in solemn Argument at Oxon, at Bar and Bench by Civilians and common Lawyers, that the Mother was next of Kin, and the Father is in Equali gradu; and that Book was then, and hath been frequently since denied for Law, as in 3 Co. 40. and Browns Case: Also the Spiritual Court are not Judges of the next of Kin, nor can they revoke Administration commit to the next of Kin, if he refuse to account, or exhibit Inventory, but may Excommunicate him. Also the Law doth more incline to the Widow, then to the Children or Kindred, but leaves the Election pure to the Ordinary; for a Wife may have a great joynture, in which case the Children, that have nothing, ought to have it; and Browns Case 1 Cr. is express, that a Prohibition lieth; and so by Hyde, Chief Justice, hath it been Resolved here, and in the C. B. And although he Suggested there was no Widow, who then, because not Married by a Justice of Peace, durst not appear, yet vigilantibus non dormierit, &c. and Prohibition awarded, per Curiam; But in suit for Repeal of Administration granted to one not next of Kin, no Prohibition ought to be awarded.

Pages Case.

(86) Excommengement.

FInch Solicitor, prayed a Supersedeas of Excom. Capiend. offering Plea, that it was not for any of the causes contained in the Significavit: and that he might be discharged of the Imprisonment: The Court agreed that the Excommunication is not discharged, but the penalties of 10 l. for not appearing

pearing on Capias, &c. are discharged; which words, 15 Car. 1. Cr. extend only to the Mulcts, but not to the Imprisonment, and so it hath been (contrary to Hugh. 5 Car. 1.) resolved solemnly by all the Judges: Also, per Curiam, the party hath no day in Court (although this be the day of the Return of the Writ) to plead, but ought to come in by Hab. Corpus, or in propria persona, and then although the Statute allow his Plea, yet the Imprisonment is at Common Law; and there are other penalties given by the Statute; and although this be no question of conformity, but only Tare to repair of the Church, which if too high, may be so pleaded in the Spiritual Court; yet the Court refused to Bail him, or allow the Plea.

Blackwell, &c. *against* Clerk.

(87) Admiral. A Prohibition was prayed to the Admiralty in suit there for Mariners Wages (which is not ordinarily to be granted) but because it was founded on Specialty made on Land, and the Custom of Merchants, that unless the Ship come home, no Wages is payable to them, and consequently not to their Executors or Administrators, and this Plea was disallowed in the Admiralty, and so its Suggested, and therefore the Court granted a Prohibition, notwithstanding Sentence and Appeal, it being contrà to a Verdict at Law, and not had on due Proofs, but contrary to the Plea pleaded.

Longvill *against* Longvill.

(88) Judgment. The Court according to Rule before made in C. B. amended Judgment, that the Plaintiff shall (for do) recover after Error brought, ex motione Proctor.

Richardson *against* Fauconbridge, Fallowfield, &c.

(89) Tythes. In Dism. Br. 11. Lindly prayed Prohibition to the Spiritual Court in Carlisle, on Suggestion that the Tenant of Blackacre did prescribe in modus of payment of 3 s. 4 s. in lieu of the fourth part of all Hay in another place; and as Moor. 483. pl. 685. was resolved in case of the Lord of a Manor, with a prescription for the fourth Cock in that place in Lieu thereof, which is but as a profit apprendre; and the libel is general for taking away so many Cart loads of Hay, not shewing whither the Tythes are of the Tenants Lands, or of other: But by the last

last Article it appeard he took away the ninth as well as the tenth part, which must be intended his own. Twisden conceived, in regard there was difference in Opinion whither such custom were good, that Prohibition may be awarded. Windham, I see not how it can possibly be, that one that is not Lord, but a Tenant, can make such a prescription: And by Twisden in 1638. in Exchequer ex relatione Bridgman Chief Justice of C. B. it was contrary to his Opinion and Argument, adjudged a good Prescription, because it ceaseth to be Tyth, but is a profit apprendre; which Hyde and Keeling denyed, for the Libel is for Tythe; and a Reteiner would be a good Modus, or this for the Lord, who is privy, and so is 44 Ed. 4. 5. but for the doubt, Prohibition awarded, and Demurrer thereto.

(90) Poor.

EX Motione Crosts, the Court refused to confirm Order of Sessions made to charge another Parish to contribute to the Poor of Hinkely, because the two next Justices, who by the Statute are made Judges within the Hundred, as in Case of Bastardy by 18 Eliz. and till their default, the Sessions cannot meddle Originally, because the Appeal is taken away, and therefore the next Justices ought to certifie there is no Parish sufficient in the Hundred; so whereever any Statute appoints the two next Justices, none can go to the Sessions Originally; contrà where it appoints any two Justices, the Sessions may Originally determin it: And, per Curiam; the Order quasht.

Sr. Martyn Nowels Case.

Thursday, Febr. 11.

(91) Proof.

THe Chief Justice refused Evidence of Depositions in Chancery, because no Rule was made on the hearing to allow them, but only a subsequent Order of Court after dismission, and it appeard not whither they were taken here, or beyond Sea, nor in English or Forreign Language, but only Affidavit that the Witnesses were Forreigners, and could not be found: But the Court conceived, if the Depositions were according to the course of the Court they ought to be allowed. Sed concordatum est inter partes.

Tremain

Error Br. 55. Tremain *against* Sands. Ante.

(92) Error. ERror allowed, but not certified till the death of the Chief Justice is abated, but if no notice be given to the Attorny, nor the Roll marked, there is no contempt in them, by suing Execution, but the hands of the Court is foreclosed by allowance of the Error; and the praying a Supersedeas is only to make the Attornies in contempt. 2. Execution was sued out on a second Writ of Error brought after the Return of the first, which was precedent to the death of the Chief Justice, and yet, per Curiam, its a Supersedeas; although it were in Ejectment on Verdict for the Plaintiff at Bar, and so apparently for delay; and the Court restored the possession to the Plaintiff.

Bondless *against* Griffith and Norwood, &c.

(93) Cinque Ports. SIr Ed. Tourner demand Cognizance on behalf of the Duke of York in Ejectment of Lands in the Cinque Ports, before any other imparlance then is commonly used on the new Rules in Ejectment, which is only the Clerks Entry, and the party cannot come in to plead: The Court ordered Entry of it, with special imperlance, salvis omnibus, &c. and that according to the Warrant shewed to the Court, he pleaded his Patent, with the Special Roll of the Court; but they would not grant Cognizance on his motion only, because Windham doubted their power was only tenere placita.

Mr. Prins Case. Ante.

(94) Mandamus. THe Court were of Opinion that the Mandamus ought to be directed to the Commissioners, who are supposed to have done the injury, and not to the Mayor of the Town, who cannot put him again into possession; and it would be dangerous for the insufficient Return of the Mayor the Act should be thus made void, and what they have done and executed, undone; yet the Court, præter Keeling, agreed the Return insufficient, for the not setting forth he was Recorder in 1661. as the Act requireth; although the Fact were, that he was then actually in: The Court granted him a Writ to the Commissioners, but privately advised their Return would be sufficient, if only that they thought it expedient: Also the Writ must be directed to the persons that did the offence, and not to the Commissioners generally.

Borrough

Borrough of Shaſtaw.

THe Court ex motione Proctor, to quaſh order of Seſſions, conceived that the Burroughs are contributory to repair of Bridges, as Inhabitants of the County, on 22 H. 8. cap. 5. unleſs they have a Bridge within their Burrough, and then they cannot be doubly charged; yet being the latter end of the Term, the Court would not affirm the Order of Seſſions made againſt them. Sed Adjornatur. (95) Ways.

Coxes Caſe.

WIlliams prayed a Secondary might Return the Jury before the Judge of Aſſize at Gloceſter, becauſe Coxe, who was Entitled to the Reverſion, had forbid Rent to be paid by the Tenant, and took on him the defence of the Ejectment brought againſt the Tenant, was of Kindred to the Sheriff and Undersheriff, and Truſtée for them; which the Court, contrary to their Ordinary courſe, granted for theſe Reaſons. (96) Trials.

Trimmer.

Friday, Febr. 12.

KEeling moved to Bail him, which Twiſden and Keeling refuſed, becauſe he cometh in by Render, and not by Return of the Sheriff, who had Returned a Reſcous, and ſo there is no perſon in Court, nor any Seiſin of the Cauſe. (97) Bail.

Selwin *againſt* Hern. Ante.

MAynard for the Plaintiff prayed Judgment, becauſe although this agreement be relative to one made when Covert, yet its all one as if ſhe had now promiſed in Conſideration that Robert would be aſſiſting to get in debts due by the Will of Rebecka, which Windham agréed; as if Feme Covert make a Will, if J. S. undertake to perform it, its good. But by Twiſden, in conſid. præmiſſorum, the firſt agreement being void, there being no Obligation thereby on her, is not ſufficient, which Keeling agreed. Adjornatur. (98) Aſſumpſit.

Nota

(99) Prohibition. NOta pro Regula, such as move for Prohibition here, ought to enquire and enform the Court whither such motion hath been before made in the C. B. that the Court may the more consider it; (and the like Rule is given in the C. B. on motions there, if it hath been before moved in any other Court) and to relate truly the success thereof, when moved for before this time in B. R. But because the Court conceived this commune placitum within Mag. Charta they did not regard the Exchequer conceiving they had no power to grant any.

DE

DE TERMINO Paſchæ,

16 *Car.* II. *B. R.* Die Mercurij, Apr. 27. Anno 1664.

Hyde *Chief Juſtice.*
Twiſden,
Windham,
Keeling.

Humphryes *againſt* Paget.

COleman moved for the Plaintiff to be reſtored to Fées taken by the Defendant, as Cuſtos brevium from the Plaintiff, who was his Clerk: And, per totam Curiam, the Clerks bred up in the Office, as in the Crown-Office, ought of right to ſucceed each other according to their ancienty; ſo in Prothonaries place of C. B. and they cannot be turnd out without cauſe, although the chief Officer be reſponſible for their Misdemeanors; and any Imployment, out of which one cannot be turned without cauſe (as this of Tranſcribing Records) may be called an Office. Ordinatur, that he pay back the Fées, and reſtore Poſſeſſion according to the laſt Rule, without any allowance unto the Cuſtos brevium's Son for his Tranſcribing as Grantée of his Father.

(1) Officer. No Aſſize lieth for ſuch having no Freehold, but only an Action upon the Caſe 51.

The Dean of St. Pauls *against* Capell.

(2) Execution. Wild prayed a Superſedeas for ſuing out Execution, notwithſtanding ſpecial Bail put in (as it ought) before my Lord Chief Juſtice, in Writ of Error, which although it be but de bene eſſe, yet its good, if no exception againſt them, and, per Curiam, till over-ruled, no execution ought to be made: The notice of Bail put in, is only to excuſe the party of contempt, but not neceſſary, ſo the Bail be put in: The Court awarded Superſedeas and Reſtitution.

(3) Bail. The Court Ex motione of Juſtice Twiſden, conceived Bail de bene eſſe an innovation; but ſo long as it ſtand, it is to be concluſive to the parties, and Filed (which the Plaintiffs Attorny hath liberty to do) if no exception be taken by the Plaintiff in twenty days, and the Defendants Attorny do not pay 10 s. or File it, which being an old Rule, was ordered to be revived, per Curiam.

The King *againſt* Mayor of Briſtow Knight, &c.

(4) Corporation. They coming in upon Attatchment on diſfranchiſing Attorny, for refuſing to ſwear (as is uſed in London,) not to ſue another Freeman at Common Law out of the Town, becauſe he had taken a Latitat againſt him, the Court conceived this part of the Oath illegal; but in regard it had been before uſed, the preſent Mayor was excuſed of Contempt. 2. They conceived that there, or in any Inferior Court, they cannot make Rules to confeſs Leaſe, Entry & ouſter, as in the Courts at Weſtminſter, but they muſt actually Seal the Leaſe at Common Law.

Ailner

Ailner, &c.

EX motione Newdigate, for a new Trial in Glocestershire, Windham conceived that Copyholder of Inheritance, where custom is to cut Timber for Repairs, nor Lessée, cannot imploy Trees felld with the Wind unto any such use, in regard that hereby his special property ceaseth; much less can Lessee, or Copiholder for Lives, by any such custom take Trees. (5) Copihold.

Gerrard *against* Lyon.

H. said to Bell, You and the Plaintiff made J. S. drunk, and pickt his pocket; which, by Crofts, in Arrest of Judgment being uncertain, is not Actionable. Sed curia contrà. (6) Slander.

Thin *against* Thin. Ante.

Tuesday, May 3.

FInch for the Plaintiff, that the Tail is dockt by Recovery of this reputative parcel, and although it hath been otherways adjudged, 3 Cr. Mallets Case 524. yet Sir Moil Finches Case which was later Judged, was contrà, that it was dockt, and first, a Mannor in Reputation will pass by the Kings Grant; but I agrée, Reputation of a Mannor is not sufficient to hold a Court Baron, if the King bring a Quo warranto, as Stavertons Case in Yelverton p. 190. but it is sufficient for a customary Court to grant customary Estates. To the Objection, That though a Reputed Mannor may be recovered, yet in this case, where there is somewhat to be recovered, in the recovery upon which it may work, that which is but parcel in Reputation shall not pass: I answer, That the reason is the same, in both cases; for a common Recovery is but a common Assurance, and if what is parcel in Reputation, shall not pass in a common Recovery, it shall not pass in an Ordinary Conveyance, which would be very mischievous. 1 Cr. 308. is a Judgment in this point. Glyn for the Defendant, Admit if a Fine or Recovery be had of a Reputed Mannor it doth pass, notwithstanding Mallets Case to the contrary; and so is the Law Ruled in Sir Moil Finches Case: But when there is a Mannor to pass, I agrée you shall not bring in any thing by Reputation, because the party had well (7) Recovery.

A Releas by Parson of all demands in Lands of a Parishioner extincts not Tyth. 1 Leonard 300. pl. 411. By Grant of all Hereditaments a Rectory passeth albeit there be other Lands, Moor. 176. pl. 310.

expresst himself; and his meaning shall not be extended beyond the words. If a Man devise his Lands, and in Truth he hath nothing but Tyths, those Tyths shall pass; but if he hath both Lands and Tyths, the Tyths shall not pass: Stiles 261. pl. 294. so if a Remainder be limited to the Son of J. S. and he hath no true Son but by Reputation, 3 Cr. 509, pl. 34. the Remainder shall go to him; but if he had other Sons, the reputed Son shall not take, Moor 10. pl. And agreeable hereto was the Resolution in Hill *against* Grange, Pl. Com. The Court inclined for the Plaintiff. Sed Adjornatur.

Glascock *against* Morgan. Ante.

(8) Execution. Siderf. 184. pl. 5.

WHat ever may hinder a new Execution, by Jones for the Defendant, will hinder the bringing a new Action, and at Common Law there was no Elegit, and the Statute regards not what fruit comes of the Writ, as 2 Cr. 339. But however, the Plaintiff cannot have Judgment, for on Record there appears, that three Elegits were sued out into several Counties, and the Defendant hath shewed one of them only returned, but nothing appears as to the rest, which therefore shall be intended not return'd, and till then no new Action can be brought, as Dy. 299. Sed non Allocatur; per Curiam, the Defendants Plea shall be taken strongest against himself, and even at Common Law, the party, although he could not have taken out any new Execution (which the Court conceived he may, unless something be return'd as extended) yet he might have a new Action at pleasure.

Adjornatur.

Pride *against* Atwicke.

(9) Devise.

ON Special Verdict it appeared H. devised all his Freehold-Land to his Wife for five years, and farther by Codicil, that if any of my three Sons W. O. or J. dye before the five years be out of the Freehold, then to be divided among those my Sons that shall be then living; and then two of them dye within the five years. Wats for the Plaintiff argued on 1 Cr. 158. Audlyes Case and 368. Sprit *against* Bence, and that for want of the word (it) this latter clause could not relate to the Lands given to his three Sons, but rather to a Chattel, viz. the remainder of the five years in the Freehold, and so much as should be unexpired, should be divided between the Sons. Jones for the Defendant, the word (it) must necessarily

sarily be intended, and must Relate to the Lands given to the three Sons, and not to the five years, because those are the last antecedent, and the five years by a direct and positive clause, are given to the Wife, and she to pay some Legacies out of it; and therefore it could not be the divisors intent to destroy her interest, 2. To be divided among the Sons, makes them Tenants in Common, and not Jointenants. But I admit, that by Death of W. and the division of his part betwixt O. and J. this clause was satisfied, and when O. dyed, his part by this clause could not go to J. but should descend to all, which the Court inclined to, præter Keeling, who conceived the Remainder to refer to the five years, and not to the Lands given to the three Sons to be divided. Adjornatur.

Saunders *against* Powell.

(10) IN Action upon the Case the Plaintiff counted quod cum the Plaintiff was possest of goods ut proprijs, which were then in custody of Smyth; And the Defendant knowing the said Goods to be the Plaintiffs, malitiose by pretext of Plaint in the Sheriffs Court in London, caused then to be Attached, as the Goods of Bawden; and notwithstanding he had notice they were the Goods of the Plaintiff, and that thereby the Goods were kept out of the Plaintiffs custody, (in the custody of the Law seventeen weeks) ad damnum, &c. Wild in Arrest of Judgment excepted that this is but only the use of the Process of Law; which although done without cause, is not Actionable, as F. N. B. 42. c. and if the Goods of any be Attacht, he may have his Proprietat. Proband. or the Attachée may come in, and swear by custom of London, that he hath none of the Goods of the Defendant in the Action there; and the malitiose is not material, the Subject matter being Lawful. Jones for the Plaintiff: If one will sue a Replevin against B. and cause the Goods of A. to be delivered thereupon, although he hath no notice, an Action upon the Case lieth; and so here, this not being like the Case of F. N. B. because here the Plaintiff cannot have Costs, as he may in the Action there, because he is party to it, and the Plaintiff here is a third person: Also he that useth the Proces of Law to anothers prejudice, is liable to an Action upon the Case. Twisden on Fieri facias against J. S. who hath Goods of A. on sale of these Goods, Trover or Trespass will lye against the Sheriff, and to prevent this, all the Sheriffs of England take Security: Also the party hath no Authority to take these Goods

Trover. Siderf. 183. pl. 3.

Goods by Suit against another person, therefore ill; also the Count being quod scienter fecit, which must be proved in Evidence; Judgment ought to be for the Plaintiff, which the Court agreed, Nisi.

Siderf. 186. pl. 10. The King *against* Darcy and Robinson.

Wednesday, May 4.

(11) Peace. INformation against them for sending a Challenge to one Aslaby, which was carried by R. and sent by D. They being found guilty, were committed to the Marshal, and the next day Fined 100 l. a piece, a Months Imprisonment without Bail, to acknowledge their faults to the King, and party in Court, as they shall prescribe, and bound seven years to good behaviour.

Siderf. 185. pl. 8. Bennet *against* Baud. Ante.

(12) Executors. ON Issue that one of the Executors of the Will had Administred, which is Collateral, without Demurrer or Plea in abatement, that there were more absent then by the Administrator were named. Twisden conceived that by Oyer prayed, this is made parcel of the Plea; and so although Verdict be on Collateral point, if on the whole Record, (as here) the Plaintiff hath no cause of Action, he shall have no Judgment, as in Debt on Obligation the Defendant pleads, as Hub. 19. 8. it was to affirm Award, and no Award made, if the Plaintiff set it forth, without assigning breach on Issue found that there was such an Award, on nul tiel pleaded, the Plaintiff shall not have Judgment, there being no default in the Defendant. Windham contrà, on the same grounds; for here is no default in the Plaintiff, nor hath he any cause Administred by the Defendant to set forth the truth, but is forced to follow the Defendants Plea, and take Issue, that there is no Executors; but if in Debt on Bond, the Defendant prays Oyer, and it is to perform an Award, and then the Defendant pleads release, which is found against him, the Plaintiff shall have Judgment. And if in our case in the Count there had been two only named to be alive, or absent, and there were three, the Plaintiff had clearly failed; but he being lead away by the Defendants Plea, its good enough. Hyde Chief Justice accorded with Windham; but by agreement the Count was amended, and Trial this Term.

The

The King *against* Cozens Gloc. Siderf. 186. pl. 9.

ORliker excepted to Indictment for Riot, 6 July, taken 5 Aug. by Justices on 13 H 4. cap. 7. thirty days after the Fact, in absence of the parties, being above a Lunar Month: But, per Curiam, in Statutes that are for Execution of Justice, the longest time shall be taken, and a Kalender Month is sufficient, although on 6 Co. 61. b. and 5 Co. 1. b. it was urged that 28 days is intended the Months for Enrolment of Bargain and Sales; and this is a Penal Law, which ought to be taken more strictly, the Court would not quash it by motion without Plea: Also the Court agreed, the Sessions may take Indictment at any time after, and that if private Justices do Impannel a Jury within the Solar Month, they may inquire after. Also by Twisden, the Justices by vertue of their Commissions, may enquire of Riot: But by Hyde, that is of offences at Common Law; but when the Statute makes any, they must pursue it as prescribed; so of Riots. (13) Peace.

Lock *against* Etherington. Ante.

IN Sc. fa. brought by Assignée of Patentée, quare execution. habere non debet against the Defendant, as obligor of Toomes felo de se; The Defendant pleads the Act of General pardon, which by Wild on Demurrer, is not good, because this forfeiture by Enquisition before is vested in the King. Jones for the Defendant, the sole question now is, whither a debt vested in the Crown, by reason of such an Offence, be not pardoned; and clearly there is no exception of such Judgments, and in the Exchequer its usual to plead the pardon, to assignment of Debts made to the King, by his Debtor, before the Act; and there is no ground to distinguish betwéen Original Debts, and Debts that come by assignment or forfeiture: it hath béen adjudged, that the Administrator shall not have this Judgment, because its vested in the King, but we affirm that Judgment. Wild agréed this is pardoned by the general words, and so shall be taken most liberally for the Subject: But by Windham and Keeling, by the clause that dischargeth all Judgments, Statutes and Executions, just Debts of the Kings, as if he had such security for mony lent, are not pardoned, but only criminal Judgments, or for any offences, are thereby intended. Hyde and Twisden conceived Pardon a proper word to discharge Debt, as (14) Pardon.

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a Release, and is here sufficiently made by the King to discharge the Defendant of this Debt. Adjornatur.

The King *against* the Churchwardens of St. Clements.

(15) Poor. Siderf. 308. pl. 2.

OFly excepted to an Indictment on the Act for making Corporation in Middlesex for relief of the Poor, for refusing to collect according to order of the Justices, which mentioned the Act only, without any time or place, because its only a private Act to this purpose. But by Windham, the Indictment is for neglect, and the other is but inducement, and so good enough; also the Law is a general Law, by Twisden, being for the relief of the Poor; also the conclusion is not contrà formam Statuti prædict. but contrà Stat. in hujusmodi casu provisi, and so may be intended on 43 Eliz. 2. Keeling conceived, that as to this place, this Act is private, and no Indictment lieth of it, but the remedy therein must be pursued: Also by Hyde, this Indictment ought not to be removed without security given to try and plead, and till then no Rule. Post.

Rhodes *against* Smyth.

(16) Error.

ON Judgment by nihil dicit in Pevrell Court, Wild assigned Error in Continuance which was not said, per Curiam. Sed non Allocatur. 2. The Judgment was quod recuperet Damna quæ sustinuit, whereas there was two Plaintiffs. 3. The Count was Queritur, only Judgment Reverst.

Williams *against* the Town of Upwood, &c. in Huntingtonsh.

Thursday, May 5.

(17) Common.

AFter a Writ of Distringas, as on Westm. 2. for throwing down Fences, and a Writ of Enquiry of Damages Returnd, and Mony in Court, the Towns came in, and desire to plead, and on Issue, that it was not nocanter found against them, and only 2 d. Damages. Coleman prayed the Mony on the former Enquiry out of Court, which the Court denied, because on this last Issue the Damages are not in question, and therefore as to them, the Verdict is not material. Adjornatur.

Deve-

Devereux *againſt* Moor and Underhill.

IN Evidence to the Jury in Ejectment by Twiſden clearly; if Lands extended by Elegit be Evict, it being a ſatisfaction for the time, there can be no new Execution; But, contrà by Windham, ſince the Statute of 32 H. 8. c. 5. to which the reſt inclined. 2. The ſealing and delivery of the Will as his Deed, in the preſence of Witneſſes, is a ſufficient publication, although the Witneſſes know not that it is the Will of the maker. 2. Poſſeſſion of the Defendant contrary to Deed of Feoffment, is preſumption of ſurrender, being fraud, and by Verdict for the Plaintiff, it was ſo found. (18) Execution.

The King *againſt* Paulin Churchwarden of St. Clements, Ante.

Friday, May 6.

KEeling moved to quaſh an Indictment for negligent Execution of their Office, in not obeying an Order of Juſtices for relief of the Poor of the Kingdom, by a late Act of Parliament, which as to this, is but a private Act, and they having ſet up a Workehouſe of their own, conceived they were not contributory to any other by that Act; and however, being a private Act, none can be Indicted, by Keeling, contrà Hyde: But by Twiſden, where the private Act concerns Government, or publick buſineſs, or perſons, and no other remedy be preſcribed, H. may be Indicted, which the others agreed, contrà Keeling; but on private Statutes betwixt A. and B. all agreed, no Indictment lieth: So on Act of Charitable Uſes, which in its own nature is not matter Indictable: The Court ordered Keeling to demur on the Indictment. (19) Poor.

Atkins *againſt* Down.

IN Action upon the Caſe quod falſo & malitioſè crimen feloniæ ei impoſuit & quandam Billam Indictamenti ſcribi fecit continens hanc falſam materiam ſequent. viz. &c. Wild Excepted in Arreſt of Judgment, in that the Malitioſè is not added to the latter part of the preferment of the Indictment, Sed non Allocatur; but Malitioſè, being in the beginning, goeth to the whole Sequel; although one part do not depend on the other, as here it doth. Judgment for the Plaintiff, Niſi. (20) Slander.

Nicholl *against* Killigree.

(21) Bail. IN an Action upon the Case, Paulet excepted in Arrest of Judgment, That the Count is, that whereas in Curia Manerij de B. the Plaintiff was pledge for the Defendant, &c. he was forced to pay, which is ill, that being to be intended Court Baron where pledge is not requisite, Sed non allocatur; for it may be the Kings Court, although it be the Court of the Mayor, as in Southwark. 2. It's said the Plaintiff became pledge in placito debiti, and so it may be only for Appearance, Sed Curia contrà, for no Plea can be till after that, and so it must be intended to pay the Condemnation; and although no pledges be requirable, yet if in fact it be required, and the pledge suffer, he may hereby recover, per Curiam.

Judgment for the Plaintiff, Nisi.

Penton *against* Brown.

Trin. 15 Car. 2. Rot. 1092.

(22) Execution. 1 Cr. 537. pl. 628. March. 3. pl. 7. Siderf. 186. pl. 11. Sheriff entring peaceably may force inward Doors, 2 Cr. 555. pl. 19. Anonymus. 23 H. 8. c. 1. §. 3. 1 Bulstr. 112. IN Bill of Trespass, the Defendant justifies as Bailiff by virtue of Fieri facias directed to the Sheriff, who per vias usuales entred the Barn of the Plaintiff where the Goods of Welstead, against whom Williams had recovered, were, &c. To which the Plaintiff replyeth the doors were shut, absque hoc that there was request; on which the Defendant demurred specially; the only point agreed on both sides, whether without request the Sheriff may break open a Barn on Semains Case, 5 Co. 93. which doth not appear to be parcel of a Dwelling-house. Windham conceived that it's not material in case of a Barn, whether the doors be open or shut, and so the Traverse taken by the Plaintiff is immaterial, as in case of a Close, there being no particular place where the Sheriff may make demand, and so the Defendant ought to have Judgment, which the Court agreed; but contrà if the Barn had appeared to be parcel of a Mansion-house: Although by Keeling there is some difference of Opinion, Hutt. 33. Coron Br. 180. (179.) from my Lord Cook, 3 Inst. 64. that the breaking it is not Burglary, and so no demand necessary. Also by Hyde, this Traverse is void, being matter of Law, and also double Judgment for the Defendant, nil Capiat per Billam.

Jones

Siderf. 187. pl. 12. Jones *against* Pritchard.

ERror was assigned on Judgment in Trespass in C.B. quare bona & catalla (not saying ipsius or sua) but in the Writ the quod cum was bona & catalla ipsius le Plaintiff, and it is not like 1 Cr. the difference of ad valentiam, which ought properly to be in the Writ, but here it ought as properly to be in the Count, which is not helped by the recital of the Writ, which Twisden agreed, and that it's ill after Verdict: But Windham contrà, that it's well enough, as the case here of taking a Hawk, not saying sua; Hyde and Keeling ad idem; And the difference is between B. R. and C. B. in regard here is no Writ at all, but only a Recital on which the Complaint is grounded, and that is on the Count which relates to the Writ. Judgment affirmed, Nisi. But in C. B. the Writ it self is at large. (23) Trespass.

Siderf. 193. Collingwood *against* Pace. Ante.

In the Exchequer Chamber.

BRidgman Chief Justice of C. B. for the Defendant, as before in C. B. it hath been agreed by all, 1. That neither the Daughters of Robert the Alien, nor Patrick the Son of Nich. cannot inherit, nor hinder the discent to George, being as persons not existing: Also the Son of George, as to the discent, is the same with his Father, which brings the Question only to Whether one brother may inherit to the other, there being no essential difference betwixt brothers born English or Naturalized, there being no alteration made by this Act: And to this the Rule 1 Inst. 8. is good, That there was never any inheritable blood in the Ancestor, and so can be none betwixt them; the preliminaries argued hath been of the nature of discents. To which I answer, That in propriety discents are termed mediate or immediate, in respect of the Estate or Right discending, not of the Ancestors; as discent from Grandfather to Grandchild, or from the Uncle to Nephew, is immediate in the per only, and not in the per & cui: Also as to the blood only, which is natural, the discent is immediate; as to the pedigree, when the Son succeeds the Father, and in collateral discents, when the blood is necessary, although not in pleading. 2. As to the Alienship, his incapacity is not properly termed a disability, but a non-ability, and so is like Edwards *against* Rogers, 1 Cr. of a barr, also the consecutive disa- (24) Denizen.

bility is not large enough for this Case, which looks as well to the persons to whom the discent is, as terminus ad quem, as to the donors or terminus à quo, and disability in either is alike; as Sons of an English man born beyond Sea, and made a Denizen, have only a right of discent from the right Line, not to inherit to their brothers that are English born; and in our Case there is a disability in both John the Earl, and George the Son: And the Act doth only cure the defect of John, but leaveth the right of discent as it was before. 3. If an English man have a Son born beyond Sea who is naturalized, he hath now Commune vinculum; but contrà of an Alien that is originally a Forreigner born, and some of both these Conditions were naturalized; and although the Act be the same to both, yet it works on Alien of forreign extraction one way, & on English extraction another; and it hath a several Operation according to the Capacities of the parties that are naturalized; a French man, although naturalized, is still a French man; and on wars betwixt the two Crowns, the obligation of Nature precedes. And so by the words of the Act, That they shall be as Liege Subjects, is only to make him a Subject, not to create any Ancestors, as if he had been of English extraction: It's true, an Act may be quoad blood or discent, but the Law is the same in both as to the collateral Ancestors; and although the elder brother be first naturalized, that doth not make him any more an Ancestor to the younger then he was before, without words that should make him convey as such. 4. By natural blood in Law is meant no more then the Line, medium or vehiculum of the Kindred, as Cosins are of Kindred in respect of the Grandfather; and civil blood is that which applyeth this in particular discents to each person; and as to Aliens that dye, the Lands escheat, quia obiit sine hærede, and therefore the distinction of civil and legal blood must still be retained; and all agreed, that by Attainder of one brother, the other cannot inherit to him: But the difference is, that they hold that the derivation ought to be no higher then the first purchaser; but this is answered, in that it's the blood natural of the Ancestor that makes them brothers, and the same blood made civil doth convey the discent and estate to them. There is a civil personal and a civil ancestrel blood which is tied to an ancestrel Estate, the other only to the first purchaser: These things premised, the reasons of my Opinion shall not be any demonstration à priori, or from principles which have not been agreed among us: But by enforcement of Cooks reason, 1 Inst. 8. there is not one Case in Law that can be instanced, where Brothers may inherit each other

other that cannot inherit the Father, and none but Children born after pardon, Stamf. 195. 13 H 7. 17. Utlary 44 of a man attaint; nor shall brother born after pardon inherit, because he that was pardoned had a personal blood left, but no auncestrel blood, because they could not inherit the Father: Hobbies Case is within this reason, for both brothers continue still as to the Mother undisabled. As to the Cases of Monability, 1 Inst. 376. 244. if Bastard eigne dye without Issue, the Mulier shall not inherit, yet shall be bound by warranty conveyed through him. Alien made Denizen by Patent, 7 Co. 6. that he and his Heirs shall be Denizens, his Children shall inherit, because he hath a personal blood, but his brother 1 Inst. 2. shall not take; yet all the Objections lye in that Case as in ours; so if his brother had been English born, no Commencer of his Family, as the brother in our Case is, can have other then Lineal Heir. 2. As in the auncestrel blood Cosins are Heirs, because they derive from the same Auncestor, Litt. Sect. 4. which is necessarily required in collateral discents: Also Litt. Sect. 6. it's impossible to take notice of the whole from the half blood, without looking to the Auncestor; and for this cause Bastard eigne cannot transmit to Mulier puisne. 3. The operative words of the Act which enables John to convey discent, 9 Ed. 4. 8. is the same with Letters Patents of the King of Denization, and therefore shall give no farther power then if they had been Letters Patents, and it shall no more extend to give the brother a capacity then to the Uncle, which all agreed it doth not. Acts of Naturalization are not so properly Acts of Parliament, as a Grant in Parliament, or a Charter, 1 H. 7. c. 2. which will carry the same sense in as out of Parliament: So in pardon of Attainder, the blood remains still corrupt, unless there be special words of Restitution, which cannot be done by Patent. Also by Act of Parliament all men are estopt to say the contrary, which is more effectual then Letters Patents: In all cases of collateral blood the ability to inherit each other is vice versa, as whenever the Nephew may inherit the Uncle, the Uncle may inherit him: So where one brother is naturalized, the other that is a Denizen cannot inherit to him; therefore Sir John Ramsey, that is an Alien of forreign Extraction, can make no use of this Clause, That he may resort to any Auncestor, lineal or collateral, but if he had been of English Extraction he might, and the Act doth not make any Auncestor. Also the consideration of the person is another reason why these brothers shall not inherit each other, and they being of forreign Extraction, their Naturalization shall be taken strictly, which appears by 7 Co. 18. from the Politick

tick Reasons of the State, and from the person, who as Scotch, are little concernd in this Case; but were they French, they alter none of their Relations or Affections by this, and therefore not to be looked on as so intire a Subject as Alien of English Extraction; 1 H. 7. cap. 2. do th look at this difference; So 22 H.8.cap.28 Pasch. 3.Car.Gret *against* Woods, such shall pay double customs. The Romans had degrees of Naturalization, Moor 791. but among us, all at once do accrue to him, therefore its not fit to extend their priviledge, no more then our Neighbors the French, who suffer not any Collateral Auncestor to inherit to such, and 15 Car. 2. cap. of Pole-mony, take notice of this difference, 11 H. 7. cap. 14. the word Denizen in Statutes being of the same effect with Naturalization; as to the comprehension of those persons, there is great difference betwixt Grants of Denization by wholesale, as to Scotland by Union, those, as the Case of Postnati, shall be taken favourable; contrà, where privileges are granted by retail to particular persons; the instances on 25 Ed. 3. hold not: And this Statute was never taken largely, but strictly; also this speaks of Forreigners of English Extraction, who are but quasi restored; but however, this Statute made nothing to the Case of Bacon and Stephenson 1 Cr. 3 Inst. 108. for Merchants at Common Law might trade as Ambassadors; but if other English Man should go without Licence to live beyond Sea, Causa Religionis, or otherways, without legal priviledge, his Issue is Alien, 21 Ed. 3. Cosinage 15. 1 Inst. 129. a. and so are the Books, and common Experience, in the granting Denizations to such; and the contrary, would make more Subjects then the King would like of, for this would extend natis natorum, &c. Also where Father and Mother are both English, and go over Sea without Licence, in Fact or in Law, (as 3 Cr. 3. confirmed by Opinion of learned Judges) their Issue is Alien, and there is more Law for it then against it, which sheweth this Law is taken strictly. The Objections made contrà, are answerable; as 1. The discent betwixt Brothers in respect of the Land, is immediate; but that is not ment here, but in respect of the Pedigree, and so it is mediate by mentioning the Auncestor; so although it be an immediate discent, yet being Collateral, it must mention the common stock, because Brothers receive no Blood from each other, but have it by Communication; and because he must say in pleading frater & hæres, doth not necessarily make him so, but it shall be tryed by Jury: Also the Law hath appropriated this word hæres to the Brother, although in Cosinage it might as well have

been

bẽn pater & hæres, Hub. 233. the Omiſſion of Coment Coſin is aided after Verdict, which ſheweth its not ſubſtance; ſo when then the Uncle makes Tytle to the Nephew, it is as frater patris, Pl. Com. 443. in Cleres Caſe, the paſſage is made through all the Line, which is well, but not neceſſary. Alſo this Rule will not hold generally on either ſide, for as the naming of the Father will not hinder the diſcent betwixt Uncle and Nephew, nor will the omiſſion of him advantage it, eſpecially in Eſtates of Fée; contrà of Eſtates Tail by the Statute of 32 H. 8. and this was the reaſon of Edwards *againſt* Rogers Caſe; and ſo Patrick might as well inherit to his Uncle, 17 Ed. 4. 1. Coron 385. 1 Inſt. 25. as one Brother to the other: Alſo that frater & ſoror are the firſt degrée, is agreed by Common and Canon Law, as to Marriage but not as, to diſcents; And the reaſon hereof is, their different Computations of degrées by the Canoniſts by couples, becauſe both are at once by Marriage concerned; but the Civilians compute by one to one; And Pl. Com. 451. our Law, as in Challenges, agrées with the Civil Law, but the Plaintiff gains nothing by either Computation, for both upward and downward take in the Common ſtock in diſcents betwixt Brothers, 1 Inſt. 24. The Law reſpects as well the Mother as the Father, therefore it is that Brother or Uncle of the Half-Blood ſhall not inherit, for their Links are faſtned but at one end, and hereby its proved that the Law looks at the Auncеſtrel Blood, in regard of which they are made diſtinct. 3. For Authorities on this point I relie on, 1 Hobbyes Caſe Mich. Noy 158. 40, 41. Eſchequer, Rot. 292. The King *againſt* Boroughſton and Adams was an Information, the ſame as Altonwoods Caſe, and adjudged after Argument of Fleming Attorny, without Argument at Bench, and pended but three Terms, and the Quéens Council was againſt it, and ſo was Popham and Anderſon Chief Juſtices, and on Writ of Error it was entred on the Roll five days after the Quéens Entry, by vertue of Altonwoods Caſe, that the Attorny would not proſecute the Writ of Error for that cauſe, not in reſpect of the matter of Law; and it hath ſince received countenance of Law, only obiter, not directly: However this, and the caſe at Bar are not alike, for that there was once inheritable Blood, which is only corrupt as to the Father, but our Brothers derive no Blood from the Auncеſtor, and ſo is like where Baron & Feme are Attainted, and have Iſſue, in which caſe they cannot inherit: Alſo I agree, the Uncle ſhall hinder the reſorting of a Brothers to the Mother only, but here the Brothers have both the ſame Blood, Brit. 15. Bract.

Bract. 13. Ratcliffs Case Co. 41. it being wholly disabled, they shall not inherit each other; and so I think of the Sons of a person Attainted, as Courtneyes Case 1 Inst. 241. about three years before Hobbyes, where it was resolved, that without an Act of Restitution the Heir Collateral could not inherit, but only Lineal, Stanf. 191. 195. by the same reason that the person Attainted can have no other Heirs, his Son can have no other; and there is much more respect to be had to the Kindred of the person Attainted, then of Alien. As to Godfry *against* Dixon, Rot. 374. Pasch. 10. Jac. B. R. the Naturalization was the like with this, but there the Father was no Alien, as in ours, but a Denizen, and so a sufficient person for both Sons to derive Blood from, although the youngest Son was Naturalized after the Death of his Father, because the Father was first made a Denizen; but had the younger been Naturalized before his Fathers Denization, there he should not inherit: Also the words of the Act are from hence forth, not from any day certain, in which case the Discent before is well executed, and the latter is a Posthumus Child, which hath the same Blood with the other Son, it being not necessary that the Line of Communication be drawn from the Father in his Lifetime; but yet this Act gives an Elder Son no benefit of his Blood, but only from hence forth, as to what is Executed; but as to the Uncle dying afterwards, the Eldest, may claim as Heir. So when Alien hath two Sons English and dyeth, his second Son shall inherit to him after his Naturalization; but if that the Youngest dyeth, the Eldest being Naturalized shall inherit to him: The Reasons of the Court in Godfryes Case were on the difference betwixt Denization, which enables the Father to be an Auncester, and Alienship, where resort is by Naturalization to be made to any Auncester; also Dodridge would not deliver any Opinion in this point, but Jones did, that they could not inherit, and Haughton did not gainsay it; and if ever there were reason to take Naturalizations strictly, it must be now their numbers increase, and in cases doubtful, and of Consequence pro bono publico, the best shall be taken for the King. 2. The Act of Naturalization adds nothing; for when it saith, he shall be to all intents as Liege Subject, it doth say he shall have no other benefit then as such; nor shall he have the priviledge of every Subject; for so he would be a Peer, and freed from Capias, &c. Also this Act cureth only the persons defect in want of Birth, but the Fathers Disability of being Alien Auncester continueth.

(2) Hyde

(2.) Hyde Chief Justice for the Plaintiff, agreed the discent to be in the right of Blood, but it is not necessary that the Natural and Civil Blood should concur to make a man inheritable, for the natural Blood cannot be altered or corrupted, but is always in all Men, Aliens or Denizens, the same: So this defect is not in Blood, but in place; change of Air alters the Capacity, Lit. 198. and it being agreed they are Brothers, F. N. B. 195. Register 274. 1 Inst. 93. the one is Auncester to the other, Lit. Sect. 132. as is proved by the words of the Writ of Cosinage or Mordancester, Lit. Sect. 350. which declareth the Law: And it is agreed, that where Alien Marrieth with English Feme, and hath Issue two Sons, 1 Inst. 8a. b. here the one shall inherit to the other, for the Blood they derive from the Mother; so much the Law favours the natural, where there is good Civil Blood; and here neither can inherit the Father: So the Rule 1 Inst. 8. is not throughly good: Also an Act of Parliament shall not Relate (without special words) to alter the Estate vested in the younger Son. The reason of Posthumus is, that to many intents the Law looks on the Son in utero matris, from the time of his being begotten by his Father: Also the Act of Naturalization doth and nothing, although I conceived in C. B. it did; But it looks only to the person, and their Children after Born, to make them as Subjects.

Keyes *against* Bredon.

Monday, May 9. *Post* 740

(25) Ejectment.

After Error here of Judgment by default in Ejectment in Ireland, the Defendant here obtains a Release of his casual Ejector, and pleads it to the Writ of Error; and on motion of Mr. Attorny for speedy Trial, Keeling conceived, that this way of Ejectment is a new device since the late troubles, and ought to be set aside, rather then be prejudicial to any: And by Hyde Chief Justice, so it was in C. B. in the Case of the Lady Anne Holborn and my Lord Leicester, because the Right never came in question: And although the Issue were, that he that made the Release was not the same person, as was casual Ejector, yet, per Curiam, it ought to be set aside, and the Errors assigned.

Roch *against* Plumpton, Casual Ejector of Witherings.

(26) Ejectment. NOta, as Course of Court in Ejectment, if the Owner of the Land cometh in, and prayeth to be made Defendant, the Declaration shall be entred as of this Term, although it were of the last Term, against the casual Ejector, but yet being by favour of the Court admitted, he shall have no new Imparlance beside that which the casual Ejector had: But by Windham, the new Defendant may plead ancient Demean after the former Imparlance, because it is not any ouster of the Court of Jurisdiction; Sed Curia contrà, he ought to plead Not guilty presently: Also by Hyde, there is difference betwixt the Tenant in possession, who is Defendant ex debito on his prayer; contrà of H. that is only concerned in the title. And the Defendant here being both, the Court only ordered him to plead at his peril.

Williams *against* the Inhabitants of Upwood and Ravely. Ante.

(27) Common. COleman prayed the Pony on the Damages found by the first Enquisition out of Court for the Defendant, and that the Plaintiff may be content with the second found by the latter Jury on the Traverse, that it was done tempore diurno, and not tempore nocturno, 1 Cr. 280. although it be found against them, for the former is but original Process, and the party may be helped by plea, and therefore may not be conclusive. Also this Distringas is but Enquest of Office, 3 Cr. 589. 1 Cr. 529. Mounson, and not like a Writ of Enquiry of Damages, for this cometh after the Right determined; whereas in our Case we may be after admitted to plead the Right, and the Damages are but incident; and by W. 2. cap. 46. the party should be no more concluded as to the Damages, then he is to levy the Hedges again: and if the Defendant is relievable without plea, his pleading doth not hurt nor hinder, but that the same Jury that trieth the Right may give Damages. So the Petit Jury on Traverse of Presentment made on the Statute of Engrossing, shall ascertain Damages, although they be so on the Oath of the Enquest in the Presentment; also the Plaintiff hath yet remedy for the making up his Fences notwithstanding the Damages. Also the Defendant hath saved the Damages by Protestation, which by Jones for the Defendant, as in Debt for Tythes, the Defendant may save the value by protestation, and plead to the Right, and the Jury shall enquire of it. Wild agreed for the Plaintiff, had the Defendants

dants come in before the Mony levied, and Fieri facis Returned, they might be relieved as well as to the Damages as Fact, but now it's too late, the other being by consent to inform the Conscience of the Court that a wrong was done, and the finding of Damages by this Jury was idle and void, for there is no other Judgment in this Case then the Return of this Alias Distringas and Fieri facias. The Court agreed this last Jury hath nothing to do with Damages on this Issue, but the party ought to come in on the Alias Distringas, præter Windham, who doubted, in regard all this Process is executed behind the Defendants back, he coming in and traversing the main Fact, new damages may be assessed. Adjornatur.

The King *against* Ring. Ante.

Tuesday, May 10.

HE now brought in a Coronation Pardon after Conviction of Forgery, and Judgment thereon, which, per Curiam, is not good, unless particular notice be taken of the Conviction; but to any that sueth it out before it is available by pleading; but by pleading Not guilty the benefit of pardon is waived. Adjornatur. (28) Pardon.

Ayres's Case.

DEnnis prayed a Prohibition to the Archdeacon of Barstable for not allowing his Plea, that he being Churchwarden had accounted before the Justices of Peace, and so by the Act of Judicial Proceedings ought not now to be questioned again for his year, which was 1659. The Court agreed the Plea good in case there were any former Ordinance that gave power to Justices to confirm the Accompt, which doth not appear here, and so not within the Act of Judicial Proceedings, but it being after shewed, Prohibition was granted per Curiam, Nisi. (29) Accompt.

Smith *against* Tilly.

(30) Admiral. POwis moved to stay Prohibition to the Admiralty, in regard that Libel was against the Ship for Promissions and Mariners wages, which hath been in these cases so constantly used, but in other cases its against the parties: But, per Curiam, this is but a device, and the parties may come in, and be admitted pro interesse, as if the Original Process were against them, 1 Cr. 296. is an anomilar Collection; and by this course if the Butcher or Baker sue, or be sued for meat sold to the Master, it should be in the Admiralty, which would be inconvenient. But there not appearing any Rule for Prohibition, Adjornatur. 712. pl. 38.

Cook *against* Bellamy.

(31) Chattels. In Devise Br. 6. SPecial Verdict finds Power possessed of 1000 years devised to Meryan his Wife for Life, after to Martyn in Tail, Remainder to himself, then made Meriam his Wife Executors, who enters generally, and after Married to the Plaintiff, and after assented to the Legacy, but before assent the Legatee by Indenture assigned to Ormond, and died. Powis for the Plaintiff conceived, that the grant of Martyn in the Life of Meriam is good, although but a bare possession, 10 Co. 47. 4 Inst. 60. b. for being by Indenture its sufficient to Estop, as Pl. Com. 434. Its clear that the Grantor could never have avoided this grant himself, and its no reason his Administrators should avoid it; also here is a kind of right passed, which shall be Assets, and may be released. That the Defendant is stranger (he coming in by wrong) doth not hinder his being Estopt; if this were a Lease, it would be without scruple; And so this is rather then an Assignment, being a new Term, and hath all the proper words, and unless it operate this way the grant is void. 2. That Feme Covert may assent to this Legacy there being here sufficient Assets found to pay all Debts and Legacies (but else I agree she cannot assent) this shall be intended on all Cases, 9 Co. 94. Vanes Case where the contrary is not found in Special Verdicts or Counts, (which the Court agreed in Special Action upon the Case on promise or Debt against Executors, but not here) she may give acquittance, 16 H. 7. 6. a. 21 Ed. 4. 14. or pay just Debt or Legacy: Also 1 Cr. 490. she is compellable to assent, and here is no wrong done to the Husband; also where an Infant may assent, a Feme Covert may.

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I agree (5 Co. Russels Case) of all things done in pursuance of their trust, 3 Cr. 43. and in 5 Co. 27. b. its imployed they have the same Authority, and all the Books mentioned both alike, and in reason there is no difference 17 Ed. 4. 4. Also she may pay a Legacy, therefore she may assent, Perkins 2 Sect. 7. 7 H. 4. 13. b. is a Judgment in this point. Lindly for the Defendant in that the Legatee hath used general and proper words to pass that interest he had, granting all his Term and Estate, as well as all the Lands, it cannot enure as Estople but rather as an Assignment, 1 Inst. 352. the Defendant is Administrator to Meriam, and cannot be any way concernd, being a stranger, and the Administrator de bonis non of the Intestate Power is entitled to the Interest as divisee, 1 Cr. 110. But the main point is, that the Feme cannot, being Covert, assent to a Legacy; she is Executrix so as to have Goods left by the Husband at his death, but during his Life the power of Administration is committed to him, Dyer 4. she cannot give away the Goods, and therefore cannot assent 3 Cr. 718. Sympsons Case is of Infant after eighteen, which doth imply that before eighteen he cannot assent. Keeling conceived as Moor 831. Price *against* Atmore, by death of the Legatee before the Wife his interest is gone, and so returns to the Divisor, which the Court agreed, if the death were before assent: Also Windham held it a strong point, that the Feme Covert cannot assent, there being an interest vested in the Husband; contrà of a bare Authority given her to sell, which the Court agreed, and by Keeling this grant is void, in that this devise is a bare contingent, and never vested in the grantor in point of interest, as Milwards Title in C. B. where Lease was made to two for Life, and of the Survivor, the Remainder to the Executors of the Survivor for 41 years (which Hyde remembred entred Hill. 1658. Rot. 518. Pool *against* Haske) both by Deed indented joyned in Grant for Life, and 21 years over to A. and adjudged that this possibility in the Executors shall go to their Administrator, and is not destroyed by the Grant, which yet enureth as an Estople: Judgment on the point of assent for the Defendant, Nisi. Windham agreed this assent, and the Husbands not contradicting it, is good Evidence that he did agree, as in the Case of Manby *against* Scot.

Whitingham

Whitingham *against* Brooks.

Wednesday, May 11.

(32) Trover. TRover de sex capitalibus fibulatis Anglicè laced Coifs, which, by Baldwin, in Arrest of Judgment, is ill, there being a proper word Crinale, Sed non Allocatur, Capitale being by the Dictionary of Westminster School shewed to the Court a good word. Judgment for the Plaintiff.

Linch *against* D' Amore. Escape Br. 37.

(33) Escape. NOta pro Regula, That if H. in Custodia appeareth by Attorny, if he obtaineth Supersedeas for Non-prosecution within three Terms, without notice of the Plaintiffs Attorny, the Marshal is not chargeable; contrà if he be delivered after Declaration given to the Clerk of the Prison, or of the Papers, but bare entry in the Marshalls Book in the Kings Bench Office, or delivery to the Turn-Key, is not sufficient to charge the Marshal with Escape. 2. Any Attorny for prisoner must give notice to the Plaintiffs Attorny, and make Oath thereof when he cometh before the Judge, to file a common Bail.

The King *against* Morris.

(34) Peace. IN Information against him for unlawful Assembly; and breaking the House of Jones of Comblette, not shewing where the House is, which, by Williams, in Arrest of Judgment, is ill. Adjornatur.

The Dean of Hereford *against* Pool.

(35) Leases. IN Trespass for taking away Tyths, the Defendant Justifies as Lessee: The Plaintiff repleth 13 Eliz. and that the Lease was with a Building not formerly let; to which the Defendant demurred: Also as 2 Cr. 133. 111. Rast. Entry 32. 34. 83. its not said that the Dean, Predecessor of the Lessor, was debito Electus & præfect, and removed: Also in the per nomina of the Lease there are Tyths mentioned in the Defendants Plea to be granted, Hub. 82, 233. but not where, which is ascertained by the Replication, which is not sufficient in regard this part is not mentioned in the Grant, but in the per nomina. Jones for the Plaintiff, 1, Its not necessary to

to shew the Predecessor was removed, because the Defendant hath pleaded to us as such; but however, this Demise is only of Tyths, and so it must now be averred that the lessor continueth Dean, for its ipso facto void by his removal; also when its said the present Dean was rightly Elect, its good here on general demurrer. 2. The defect in the per nomina, if any, is the Defendants own; but its good, and must agree with the Lease; whither it hath name, where, or not, the Court regarded not this Exception; but as to the former, had the Plaintiff said nuper Decanus least to him, he had agreed him not to be now Dean, by Windham and Curiam; but being quod tunc Decanus least, &c. its well as to that: But, by Windham, the continuance of the Life of the Dean ought to be averr'd, H. 3 Jac. 2 Cr. 111. Moor 778. as well here on Lease for years, although the contract remains as in case of Lease for Life. Judgment for the Plaintiff.

Appleton *against* Brian.

IN Debt on Obligation, with condition of Bottomree to pay 130 l. when the Ship should return from Norway. The Defendant after Oyer pleads corrupt agreement for lending 50 l. to pay according to condition; to which the Plaintiff demurred; and, per Curiam, its no Usury, as in the case of Grene Attorny in C. B. hath been lately resolved. (36) Usury.

Judgment for the Plaintiff.

In Damages, Br. 52. Aleway *against* Roberts, Ante.

Thursday, May 12.

JUdgment had in Dower in C. B. and a Writ of Enquiry is brought, then the Tenant brings a Writ of Error, & pendent ceo, the Tenant dyeth before damages ascertain'd, and now in Scire facias, Stroud for the Plaintiff conceived the damages were not lost, the damages being no parcel of the Judgment at Common Law, nor on Stat. of Merton in Dower, unde nihil habet; this being a remedial Law, and so liberally expounded to prevent the mischief at Common Law, viz. the detainment of Dower; here being delay only by act of God in two discents, without any default of the Plaintiff: Also the purchasing a Writ of Error is an act of the party, and shall be intended for delay when the Judgment is affirmed: Also by this Statute Tenant in Dower of Copyhold shall have damages, which the Court denied, unless there be special Custom, as (37) Dower. Siderf. 188. pl. 15.

as 4 Co. 34. Shaw *against* Thomson, to have the Dower, 3 Cr. 557. William's Case, Yelvert. 112. the Executors shall have the recovery of damages, which sheweth the Statute is not taken literally: But per Curiam, this is after recovery of damages by the Tenant in Dower. 2. The Enquiry of Seisin is to inform the Court, 14 H. 8. 25. and to it the Defendant can have no answer, and the damages are included in the first Judgment, Moor 80. 1 Inst. 33. and the Writ of Enquiry is only to ascertain them; and so though the Land be changed by shifts, discents, or alienations, yet being charged with the Judgment, it shall be charged with the damages. Keeling said there is no Judgment, but only an Award for damages, and so not differing from the common Case; and Moor 80. is nothing to this Case, for if the death be not pleaded by the Defendant, it cannot be taken notice of: Windham ad idem, The Heir cannot be bound for that which never vested in the Ancestor; also had the Tenant died before Judgment, all had been gone against him, and being after as to the Heir, who is no party to the Writ, it cannot bind him without particular Judgment of damages, which binds the Land. Twisden and Hyde for the same Reasons accorded. Judgment for the Plaintiff, nil Capiat per Breve.

Smith *against* Tilly. Ante 708. pl. 30.

(38) Admiral. The Court were divided, Hyde and Windham against Twisden and Keeling, That this Libel against a Ship for provisions is as good as for Mariners wages; but by Keeling, this is but by sufferance, because they are poor men and going to Sea; also Windham doubted that a Ship may be pawned in England: But by Keeling, Clearly it cannot be pawned in England, but only by distress beyond Sea. Also by Hyde and Windham, this is in discretion to grant, or not, which Twisden and Keeling denied, and that it is of right; and yet after the party hath proceeded a long time there, this Court may by discretion deny it, but not where the Original Act is out of their Jurisdiction. Adjornatur.

Car-

Siderf. 189. pl. 16. Carpenter *against* Marshal.

IN Ejectment of Wills lying out of the County Palatine, by Special Verdict the Grant of Remainders was found by the Crown to Ferrers and Philips, after a Lease for years, and that there was no Attornment; yet by Maynard for the Plaintiff, it's well enough; he agreed, as setled, that such Lands will not pass without Livery, as 21 Ed. 4. 60. for that the Freehold remains as before it came to the Crown; but this is good without Attornment, else the King will be in worse condition by 1 H. 4. cap. that intended him a benefit, then a Subject is, for the King hath no means to procure Attornment without circular contrivance, not by any direct assurances, as quid Juris Clamat, for he cannot levy any Fine now as he might when Duke, Pl. Com. 220. therefore the Law shall supply the remedy, or quod remedio destituitur ipsa re valet si culpa absit; for this cause his Grant is good, though Infant, and this is the ground of all Remitters, 48 Ed. 3. Goodcheaps Case, though the Tenants do not attorn, the Lands shall be devested out of the King without matter of Record, because it can be no otherways done: So 5 Co. 113. 3 Cr. 354. although Conusee shall not distrain without Attornment, yet the Lord by Escheat shall: Also if this be granted, the King cannot directly alien (without Recovery by contrivement) without leave of the Subject, 4 Inst. 209. is positive in this point on several Reasons expressed and implyed. The Writ under the Dutchy Seal to compel the Tenant is but an equitable, not legal way. And by Walter in the Case of Sir John Temple in the Exchequer, it was said to be ruled, that an Attornment by compulsion of a decree in Equity, was no Attornment pleadable. (39) Cinque Ports.

2. Coleman for the Defendant, It is found as well that there is no Seisin nor Attornment: And as to whatsoever doth affect the Estate, or Assurance, the King is in the same Case with a Subject; but as to personal disabilities, as Infancy, &c. these are aided by his being King: Also the Dutchy Seal, as to matters out of the County Palatine, is no Record, for to make it so is necessary a Royal Impression, which is true in all Cases, and the Essence thereof; and for this reason, within the County Palatine, the Prince having Jus Regale, it is a Record, but not so of things out of the County Palatine, for these the King grants not Jure Regali, but in a distinct Capacity, Moor 167. The Dutchy Seal will not make a Corporation out of the County, 5 H. 7. 24. Nul tiel Record cannot be pleaded to any Deed in Curia prolat. and therefore this is

no reason for Cooks Opinion; but if the Kings personal Prerogative do excuse him, as that he need not deliver the Deed, yet this shall not affect the Estate, 26 H. 8. 9. Moor 194. Attornment is as material to the passing of the Estate in Reversion as Livery is, when in possession, and no difference betwixt them, Pl. Com. 215. b. I rely on for this point, 2 & 3 Ph. & Mar. cap. 20. 37 H. 8. cap. 16. do agree; and the Presidents are this way, as well for passing the Estate as privities, and the King at worst is but in the same case with a common person: Also this Equitable Writ is by 4 Inst. 206. as effectual as quid Jur. clam. viz. to imprison the party till he Attorn, and as to that quod remedio destituitur valet si culpa absit, this is true not only to pass the Estate alone (as here is urged) but also all the privities incident.

1. Keeling conceived it a strong Case for the Plaintiff, as to the passing the Estate only, for whatever is dishonourable to the King, shall be dispenced with in the Kings Grant, as Nonage, &c. and the difference betwixt Livery and Attornment is clear; for as to that, it's in his own power, and he may do it by Letter of Attorny; but here it would be dishonourable to the King, that a Subject should have check to the Kings Grant: Also since the Accession of the Crown, the Dutchy Seal is a Record here, in respect of the honour of the person of the King, and by any Record the transferring the Estate was sufficient, 1 Inst. 314. b. Droit, Fitzh. 33. although no privities pass. Also without Attornment the prejudice is the Grantees, but no inconvenience shall lye on the Kings assurance; also the King may make a Corporation by the Great Seal: So Moor 167. it's not necessary it should be so construed under the Dutchy Seal. Also we shall not judge according to a compulsory means in Equity, for then it would be in the Tenants power to destroy the interest of the Grantee, which in quid Jur. clam. he cannot; the Presidents have been always this way, and there is no President where the Kings Grant is avoided for want of it, although many there be that Attornment was had.

2. Windham agreed the Opinion of the Books with the Defendant, but on the great inconvenience seen by froward Tenants refusal, 1 Inst. 215. the Judges found out this distinction betwixt the passing of the Estate and privity to reconcile the Books to the setled Practice and Law. Twisden and Hyde ad idem; and that this is a matter of Record, as well as the Privy Seal or Sign Manual, being done in his Politick Capacity. Judgment for the Plaintiff.

Brown

Brown *againſt* Ward.

WInnington prayed to ſet aſide a Plea in Abatement and Special Imparlance, as being too late after Declaration, being delivered before the Eſſoin-day of the latter, as of a former Term, which the Court agreed; and that on the Eſſoin-day the party cannot pray Special Imparlance, but ought to enter it at the ſame inſtant with the delivery of the Declaration, although he know not the cauſe of Action, or before the Eſſoin-day, and becauſe he had not, the Court ſet aſide the Plea. (40) Abatement.

Siderf. 190. pl. 18. Wright *againſt* Bright.

Friday, May 13.

IN Treſpaſs, the Defendant after General Imparlance pleaded that he, and two others not named, did the Treſpaſs, and ſo prayed Judgment de Billa. Coleman prayed Judgment final, becauſe the Treſpaſs is confeſſed, although the Plea be but with concluſion, Judgment quod Billa caſſetur. But, by Windham, the party may after this plead Releaſe of the Plaintiff in chief, which the Court agreed; and it's not like a Plea in barr which concludes in Abatement. Reſpond' ouſter awarded. (41) Treſpaſs.

Webſter Executor of Colvert *againſt* Bot Executor of Gravenor.

IN Scire Facias ſuggeſting the Executor had waſted (after Judgment in Debt) on Iſſue that they had not found, againſt them, and Judgment, they brought Error in the Exchequer. Williams prayed leave notwithſtanding, this being no Scire facias, to have Execution, and ſo not within 27 Eliz. as 1 Cr. 464. 286. which the Court agreed, had this Scire facias been as original Action; contrà where it's only in purſuance of the firſt Judgment: But this Writ of Error being tam in redditione of the original Judgment, as in the Execution and Scire facias, the Court conceived it was within the Statute: But the Writ of Error not being allowed, (which per Curiam, ought to be within four days after the ſuing of it out, and within four days after that the Bail ought to be put in, or elſe) the Plaintiff may take out Execution; and this bing an Action for ſpecial tort of the Executors, they, by Windham, (42) Executors.

ham, must put in Special Bail, which shall answer all the first Judgment: But by Keeling, the Bail is put in before the Judgment, and ought only to be of the value of the waste found, not of the original Judgment, by 3 Jac. Twisden conceived Executors only liable by 13 Car. 2. to pay double costs, but not within 3 Jac. unless debt be brought against him on the first Judgment, which he hath by devastavit made his own debt, which the Court agreed.

Siderf. 209. The King *against* Hereford. Ante.

(43) Attorny. So to say H. entred lawfully is ill. 34 H. 6. 4. b. pl. 9.

ON Mandamus to restore him to his Town-Clerks place of Hereford, they Return that he was never debito modo admissus, which by Twisden & Keeling & Curiam, is ill, in that hereby no particular Issue can be taken: But there being another Cause of the same Nature of Maidstone pendant, this was adjorned till that determined.

In Disms, Br. 11.

(44) Tythes.

WInnington prayed a Prohibition, suggesting a modus by paying 1 d. per Annum for a Calf, so for a Horse and Cow, in discharge of the Tythe of all gross Cattle; and by Keeling it is ill, which the rest agreed.

Siderf. 190. pl. 19. Thin *against* Thin. Ante.

Hill. 12 & 13 Car. 2 Rot. 448.

Saturday, May 14.

(45) Recovery.

HYde Chief Justice delivered the Opinion of the Court, that this Moor-Meadow, and Lanerton Lezo, which since 4 & 5 Ph. & Mary, have been reputed and demised by Copy as parcel of the Manor of Buckland, but revera no parcel, yet they pass by the Bargain and Sale, and recovery of the Manner had against Tenant in Tail, because the Bargain and Sale which leads the Recovery, sheweth, that the intent was to pass all Lands, parcel or reputed so, and the Recovery being pursuant thereto, and having sufficient Lands, will pass this the rather, being common Assurance. Judgment for the Plaintiff.

Win

Win *againſt* Lloyd. Ante.

ERror by Vouchée of a Common Recovery in Angleſy, in quod ei deforceat, with Proteſtation to proſecute a Writ of Entry in the Poſt; the quod ei deforciat is Teſte, July 1659. Ret. the next Seſſions which was 7 Aug. the Ded. pot. is Teſte 17 Aug. Retorn. 19 Aug. the Caption of the Warrant of Attorny for this Ded. pot. was before the Retorn, but after the Teſte 28 July the ſum. ad Warrantizandum Teſte 20 Aug. ſubſequent to the Retorn of the Ded. pot. The one Error, by Wild the Kings Serjeant, is, the Copy of the Warrant of Attorny of the Vouchée, but this being ſetled in Argentons Caſe, 3 Cr. Hut. Champernoons Caſe, he would not inſiſt on: But the Error he inſiſted on was the inſufficiency of the Ded. pot. bearing Teſte before the ſummoneas ad Warrantizand. which, per totam curiam, is ill, Dyer 220. and where the Fine is taken by Dedimus, Yelverton 34. the Dedimus is parcel of the Record; contrà where the Fine is in perſon. And 27 Eliz. cap. 9. of Miſentry, doth not aid where there is no Warrant of Attorny, as in this caſe there cannot, there being no Plea dependant: Alſo there can be no other Warrant of Attorny intended than is certified on the Writ of Error, although there be a General Warrant entred at the end of the Roll, for this is revera the ſame, and not diſtinct from the Ded. pot. Jones for the Defendant, the placita is entred as of 17 Aug. that this Warrant of Attorny coming in in time before the Ded. pot. or Summoneas ad Warrantizand. which is as the Original betwixt the Vouchée and Demandant, is well enough; and the Summoneas ad Warrantizand. void; for if the Tenant will anſwer without it, its good. Voucher F. 230. Alſo he may come in ſo by Attorny, 22 Ed. 3. 7. b. without Proceſs, Voucher 197. 13 H. 7. 24. and therefore its like Venire Facias Teſte out of Term, or before Iſſue, which is void, and hurts not. 2. Admit the Summoneas ad Warrantizand. be only voidable, it will not hurt this Recovery, in that the Foundation of the Recovery depends not on it, but its an interlocutory Proces, 4 Co. 45. to bring in the Vouchee, and is as in mean Proces, Error, which is cured by appearance of the party; however this firſt Warrant be ill, or not, yet its cured by certification of the latter on the Record, in a different manner from that certified in the Ded. pot. And had ſuch a new Warrant been delivered into Court, its good by the party himſelf, although a ſtranger cannot bring in any Warrant of Attorny without (46) Wales.

Ded.

Ded. potestat. And without question, had there been no Warrant of Attorny in the Ded. pot. the latter would be intended good; and why in a Record the Court should intend a Repetition, being a thing indecent, I cannot see: But however, the latter differs in the Entry of it, and its conclusion and intendment shall never destroy a Recovery; as in case of two Originals certified, the Court will take the best. The Case of Dyer 220. there was but one Warrant of Attorny certified, which was impossible to be good, because the Mittimus out of Chancery came in to C. B. after it; but here is no Mittimus, but it may be intended to come in in time. Adjornatur.

In Jours, Br. 84. Ellis *against* Jackson.

(47) Days. IN Trespass of Assault and Battery by Special Verdict, it appeared that the Defendant, as Bailiff of the Sheriff, arrested the Plaintiff the 10th of February, on a Writ of Non omit. out of C. B. which was retornable Octabis Purific. which was after the first, or Essoin-day, but the days of Grace to the Return of the Writ is two days after: And the Court conceived, that although the Sheriff may Return his Writ after, yet his Office quoad arresting, is determined on the Essoin-day, which being no moveable Feast, the Court may take notice of the day of the Month. Adjornatur.

In Error, Br. 186. Partridge *against* Walter.

(48) Leet. THE Defendant in Trespass for taking Goods justified as Bailiff of the Bishop of Lond. who prescribes to distrain the Goods of any person amerced within the said Manor, that are on the Lands of such person, and do not shew in this case what Estate he had, and this must at least be intended the Freehold, and the distress is taken on a Tenant of the party amerced: But as more material, the Prescription was to distrain by his Bayliff of the Manor, and here it's said only quod Def. ut Ballivus Episcopi, and saith not Manerij; for which Causes Jones for the Plaintiff demurred, and this defect the Court conceived incurable, but (ut Ballivus Manerij, although similitudinary, is sufficient. Brack. 264.) Also this offence is intended in Court Baron, Hutt. 212. being incroachment on the Lords Waste by building Cottage: The Court agreed also that Prescription to sell a Strangers Goods is ill, but only to distrain is well enough: Also this Justification ought to sever at which Court, whether at the Leet or Court Baron the offence was done, and not to say generally ad Curiam Visus

Britt. 208, 1 Inst. 17. b.

Distress, Br. 18. March. 161.

sus & Baronis, &c. And 48 Ed. 3. 13. a pain cannot be laid on a private Trespass to the Lord; contrà on a Nusance; but if this concern all the Tenants, a pain may be set, as on digging in a Common, which must be intended by Tenant, not on stranger which oweth no duty to the Lord.

Bowman *against* Milbanke. Devise Fitzh. 30.

H. possessed of Burgage Lands animo testandi by Testament devised (all to my Mother, all to my Mother;) which appeared by Special Verdict, in Ejectment; and the Court inclined that no Houses or Lands passed hereby. Glyn for the Plaintiff the Heir at Law, conceived though the words be general and uncertain, yet having no precedent discourse of any Lands, nothing shall pass: Also if it were a good Will at Common Law, yet it cannot be said according to the custom, however the words are most rationally satisfied in the passing the personal Estate. Jones for the Defendant, the custom is found, that Lands may be devised by Paroll, and is as strong as if the words were at Common Law in writing, in which case there can be no more extensive gift then all, qui omnia dicit nihil excludit; so all his Estate of all kinds is comprehended, or nothing, 1 Cr. 450. was liable to the same objections as here; so Bendlows 6. and Owen 30. devise of all my livelihood passeth real and personal Estate: So 2 Cr. 144. And the words of our Will cannot be satisfied with less; nor shall the Court intend there were goods, here being none found: And in Kerman *against* Johnsons Case B. R. by Twisden it was adjudged, that by devise of his Estate, the real as well as personal, passed, and so he conceived here. Windham conceived, the Jury ought to have found with what intent, in relation to the Burgage, the devise was made, and not to have left it to the Court. Keeling, the Verdict is good; so Hyde: But this all is an Adjective, and not to be satisfied without a Substantive, and so not like the devise of all Estate, but too general to pass any thing, but at least to pass any Lands. Judgment for the Plaintiff the Heir at Law, Nisi.

(49) Devise. Siderf. 191 pl. 20.

Lee *againſt* Boothby. Ante.

Monday, May 16.

(50) Copyholder. IT having been adjudged that a Leaſe for years of particular name of Copyhold, together with the Manor by the King, hath not ſo extinct the Copyhold (although by the Surrender of it, it is parcel of the Manor in the King) but that after ſuch Leaſe the Patentee of the Reverſion of the King may regrant it as Copyhold now on feigned Iſſue out of Chancery, whether the Lands were Copyhold, and belonging to the Defendants, or one of them. Keeling ſaid it had been adjudged, that although ſeveral Tenures be reſerved on the former Grant, yet the Copyhold is not deſtroyed, but paſſeth as included in the Manor, cum pertinentiis, in the Premiſſes: Alſo ſurrender of a Copyholder to the King, Lord of a Manor, was there adjudged good, without other matter of Record. Alſo by Windham now, as in the Caſe of Sir John Rogers, Copy of a Leaſe which the Lord had in his hands, whereby the Tenant had power to make Leaſes, is good Evidence without ſwearing it a true Copy: So is Copy of Roll under the Stewards hands, who was Counſel for the Lord Plaintiff, was admitted good for the Copyholder; but contrà of ſhort Notes by way of Breviat, which the Court agréed; and alſo that finding by Special Verdict or Admiſſion on former pleading, is good Evidence unleſs the contrary appear. The Court on the Evidence here conceived, that without expreſs Grant the Copyhold cannot be ſever'd by any different Reſervation or Tenure, yet the intire Manor may hold by different Services of different perſons as to the Demeſns, although not the Services, as well by the Grant of the King as of a common perſon, without diſjoyning any part of the Manor, as Reſervation of one Service on the Grant of the Manor, another of the Advowſon, which was before reſolved in the Caſe of Chinkford and Pauly. Alſo a Grant for Life by the King is only a Severance of Copyholder pro tempore.

Baltie

Battie *against* Smith.

COleman prayed Consultation on shewing Letters of Request by the Bishop of Norwich to the Arches, dated before the Prohibition, which was granted on 21 H. 8. c. 9. for citing out of the Diocess. Keeling prayed it may be pleaded according to Jones's Case, Hub. because if the Case were not within the Canon Law, they cannot grant Letters of Request, as in this Case, which was a Suit for Tythes arising in the Inferiour Diocess: But, per Curiam, they will intend the Case within the Canon Law, unless the contrary appear, wherefore the Consultation was granted without pleading, unless by Civilians by a day it be made appear it's no such Cause as is allowed by the Canon and Civil Law; for prima facie, it appears by the Letters of Request to be within that Law, because Tythes generally are so. (51) Ordinary.

Smallbrook *against* Slaughter.

Friday, May 20.

WIld the Kings Serjeant prayed a Prohibition to the Archdeacon of Lichfield, in a Cause where the Defendant libelled for forging Letters of Ordination of Priests and Archdeaconry: Sed Curia contrà; for this may be enquired by the Spiritual Court, and the party deprived as merè Laicus: But by Twisden and Keeling, they cannot criminally proceed; Sed quia Copy of the Libel was denied, Prohibition was awarded quousque. (52) Encumbent.

Blewit *against* Perkins.

IF the Declaration in Ejectment be delivered after the Essoin-day, it's but Entred as of that Term (and not of the Term before) and the Plaintiff in such case cannot have Judgment the same Term; but if he doth not move the following Term to have Judgment, especially if any Assizes intervene, he cannot have it without new notice left at the House of the Defendant, and the Default made as at first, per Curiam, ex motione Keeling for Judgment, &c. (53). Ejectment.

Spencer *against* Venacre.

(54) Bankrupt. J. H. by Special Verdict appeared to be a Bankrupt, and was committed two Months in 1651. and recommitted for another act in 1657. and then the term for years whereof he was possessed was sold to the Defendant by the Bankrupt, and in 1660. the Commissioners sold to the Plaintiff. Baldwin moved to stay Judgment, because this Commission shall relate to the first act in 1651. which was the most notorious, being by Imprisonment; although had the first act been by Concealment or Vitlary, I agree the party Creditor need not take notice of it by 21 Jac. which shall not be taken favourably against the Purchaser, but only against the Bankrupt himself. The Case of Gove in C. B. although after five years, yet the Sale of the Bankrupt being after the last Commission sued out, was adjudged void, because in such case it shall relate to the last act; so the Case of Bradford *against* Bludworth on the Bankruptsie of Harrison: Sed Curia contrà; for the words of the Act are not after he shall first be a Bankrupt, for then the earlier being a Bankrupt, would after five years be a perpetual Supersedeas to all Tradesmen; but if one hath sold, and then five years pass, without any Act of Bankrupsie, the Purchaser is safe, and no after Act can hurt him: But where the Bankrupt continueth in possession, any after Act is sufficient to bind the term.

Judgment clearly for the Plaintiff.

The King *against* Arnold.

(55) Tresp. In Arrest of Judgment, it was excepted that the Indictment was on 5 R. 2. cap. 7. for Entring (ubi ingressus non datur) into unam parvam peciam terræ with Abuttals, but doth not say how many Acres: But per Curiam, after Verdict it's good, as in Clausum in an Indictment; contrà in Ejectment. 2. It was further for pulling down Pales, &c. contrà formam Stat. which, per Curiam, is well enough, and only aggravation.

Judgment pro Rege.

The

The Creditors and Sir Charles Stanly. Ante.

Saturday, May 21. Ante.

WIld the Kings Serjeant prayed, he being the Kings Prisoner for Murder, might be discharged of all Actions laid on him since his Conviction, which the Court refused, the Original cause of his being so being a Rescue of himself from Arrest, which shall not be extincted, as to him, by his after murthering the Bailiff: But however, there being several Causes laid on him before, that is sufficient to lay any after. (56) Priviledge. Execution, Br. 98. Pardon, Br. 44. 3 Cr. 516. pl. Noy 1. pl. 3.

Smith *against* Brown, &c.

ON Non Assumpsit pleaded by the Executors in an Action upon the Case, Stroud moved in Arrest of Judgment, because the Costs are given de bonis propriis, there being no Assets, Sed non allocatur. 2. The County was in the Margent, and A. without in Com. præd. in the Count, which in C. B. is well enough. Judgment for the Plaintiff. (57) Executors.

The King *against* Cros and Dabbin.

SIderfin moved to quash an Enquisition super visum Corporis, said to be taken at Axminster, of the Body of John Brocas, without saying it was a Mill, or next adjacent, which per Curiam ought to be, but not in the Return; but per Sacrament. J. Witny & aliorum Parochiæ Axm. prædict. But by Keeling it ought to be in the Return said, the next adjacent Mills by 4 Ed. 1. pag. 28. de Officio Coronatoris. 2. This was for Deodand of a Bell in a Steeple, whose Rope hung the Ringer, F. Coron. 405. 389. which the Court doubted, being fired, is no Deodand; contrà if by falling it had killed any, for then it's a Chattel, as Milstone falling from the Mill. (58) Coron. Siderf. 204. pl. 1

Adjornatur.

Potter *against* Manucaptors of Lloyd.

(59) Bail. EAkins prayed to discharge a Judgment in Scire facias against Manucaptors, both being delivered after the day of the Return of the last, and so they had no time to plead; Sed curia contrà; for the Bail is liable by the Judgment, and if they be Freeholders in the same County where their Recognizance is made, then they must have notice and time, because Sc. feci may be Return'd; but if they be strangers, the Sheriff is not bound to warn them, and so need not give notice, but Return nichil on both together at any time; for this is but a favor to the Bail; who therefore at their peril ought to bring in the Principal within 30 day: And thus on search of presidents in C. B. ex motione by Justice Keeling then Serjeant, and on conference with Sheriffs and Clerks of B. R. it was resolved and setled.

Hounsell *against* Adams.

(60) Assumpsit. STroud moved in Arrest of Judgment in Action upon the Case on promise by the Defendant, that if the Plaintiff would not compound with one Fouk, who entred on Land of the Plaintiff, claiming Title, and cut Furze, here appearing no benefit to redound to the Defendant, nor loss to the Plaintiff: But, per Curiam, it shall be intended benefit. 2. The promise was farther, to save the Plaintiff thereon harmless, though it cost him 100 l. the Plaintiff sheweth the entry, and that certain Furze was by him cut and carried away, & ad usum suum proprium convertit, which per Curiam is sufficient breach, without shewing other special Damage.

Judgment for the Plaintiff.

(61) Church. WIlliams prayed a Prohibition to in suit of A. for not repairing the Church, who pleads that J. S. the Vicar hath time out of mind chosen Churchwardens, and that the Plaintiff was unduly chosen by the Impropriator, which by the Common Law hath right. Hyde and Windham refused to grant it, because this was an incident question; contrà if Suit were originally by one Officer against the other: So Kel. in Suit for Legacy, as Son and Heir, the Defendant saith he is not Son and Heir, it shall be tried by them, which the Court agreed: But by Keeling and Twisden, were the matter only Common Law, it might be there triable, but special custom of Election being alledged, its no more

more triable by them then Bonds of Parish, or Parson or not Parson in Suit for Tythes. The Court being divided, no Prohibition.

ERror of a Judgment in Assault and Battery, by Newdigate, assigned in that the Record is, J. S. nuper de Kelsey in Com. Warwick, the Writ of Error is J. S. de Kelsey in Com. Lincoln, the Court inclined it was no variance, but doubtfully dividing, the Plaintiff agreed to take out new Writ by consent. (62) Trespass.

Casebroke *against* Helliar.

NOta, by course of the Court, after Verdict on Writ of Enquiry, the next day the Plaintiff may have Fieri facias Returned, before the Rules for speaking in Arrest of Judgment be out at the first day in Bank, if this be in to London or Middlesex, and only to entitle the party to a Testatum Fi. fa. ex motione Serjeant Windham, reported by Linesy Secondary: Also the Testatum may be Teste the day of the Return of the former Scire facias. (63) Execution.

Hall *against* Uppington. Ante.

SErjeant Broom prayed that Norwood might be admitted to plead in Abatement, that the Lands in the Ejectment are within the Cinque Ports, the rather because she is made Defendant by Rule of Court, with a special Imparlance, to which Twisden did incline: But by Windham and Keeling, unless Auncient Demeans, no special Plea hath been allowed; and there only, because the Land would be prejudiced by Trial at Common Law: So in Durham, such Trial would be void; but, there is only an ouster of Jurisdiction, but clearly if one pray to be admitted Defendant, he cannot have such Plea: And Twisden said, it had been contrary to Dyer held, that a Writ of Error at this day lieth at Common Law on Judgment in the Cinque Ports, there being no such Court as Shepway, as they there, by feigned Suit in Chancery of Dover, in nature of a Writ of Error before the Lord Warden, supposed. The Court, Hyde absente, ordered him to plead in chief. (64) Ejectment.

Scurre

Scurre *against* the Official of York.

(65) Prohibition. SAys, after Excommengement of the Plaintiff, prayed a Prohibition for not delivery of a Copy of the Libel, which the Court granted; but conceived that on delivery of the Libel, the Excommengement stands in force.

Brigs *against* Brecknock. In Disms Br. 17.

(66) Tyths. BIgland prayed a Prohibition to the Official of Litchfield, on Title made by Letters Patents, and the dissolution of Monasteries, as Impropriator in Suit for Tythes on Seisin del Abbot, which the Court denied on 12 Co. 66. Whiskers Case, this being nothing different.

Siderf. 214. pl. 14. The King *against* Reyner.

(67) Peace. SHelton prayed a Capias pro fine pro Rege, the Defendant being Convicted of Barretry, and no Errors assigned, though a Writ of Error was brought of that Judgment, which the Court granted unless within four days Errors be assigned, although no Rules were ever given in the Crown Office by the Prosecutor to assign them; for by Waterhouse Secondary, and all the Clerks of the Crown, no Rules are ever given on the Criminal side to assign them, but it must be done at the peril of the Plaintiff in the Writ of Error.

Monday, May 23.

(68) Indictment. H. Endicted for practice in withdrawing an Apprentice; after not Guilty pleaded, and Verdict, demurreth generally on the Indictment, on the President in Co. Entr. 363. which the Court disallowed, and Twisden conceived that was some Scire facias against the party. Judgment for the King ex motione Brewer.

The

The King *against* Hinkley.

OFfly prayed a Procedendo on default of putting in Bail in Certiorari, on removal of an Indictment, for using a Trade contrary to the Statute of 5 Eliz. which the Court refused, being necessary only on removal of Force or Batteries. (69) Trades.

The King *against* Sir Purbeck Temple. Ante.

HE was fined One thousand Marks, Imprisonment during the Kings Pleasure, Good behaviour for a year, and the next Assize to acknowledge his Offence publickly, on Conviction of Extortion, and compounding to give new Licences to unlawful Alehouses, and take away good ones, and for discharging Recognizances for Appearances at Sessions, he being a Justice of Peace in Surry; and the Archbishop claimed his Fine. (70) Peace. Siderf. 192. pl. 22.

Pritchard *against* Jones. Ante.

ERror of Judgment quod recuperet Damna sua præd. ultra mis. & Custag. ad 14 l. pro misis 40 s. the Verdict finding the Defendant guilty of the Trespass, & 12 l. ultra mis. & pro misis 40 s. which, per Cur. on Assignment by Wild, the Kings Serjeant for Error of Judgment, is ill, and should have been generally, quod recuperet Damna sua prædict. per Juratores prædict. in forma prædict. assess. ac etiam de incremento. Twisden on the Case 2 Cr. Mason *against* Fox, conceived this amendable, being but a mistake in miscasting the Sum, 2 Cr. Grenvill *against* Smith in the Postea, this being a Writ of Error, the Court said it ought to be amended in C. B. where the Original is: But by Twisden, by Diminution alledged it may be done here, and certified hither, and here amended accordingly; and so was the Case of Mason *against* Fox: But there being other Errors, the Plaintiff prayed to Reverse the Judgment for Expedition. (71) Error.

The

The King *against* Selby.

(72) Maintenance. BIgland moved to quash an Indictment, being removed hither by Certiorari, for the generality of it being grounded on 32 H. 8. 9. and saith only quod manutenuit sectam J. S. not shewing how, which, by Windham, is needless, and it's well enough without: The Court would not quash it, but directed this Exception to be moved in Arrest of Judgment after pleading.

DE

DE TERMINO Trinitatis,

16 *Car.* II. *B. R.* Die Veneris, Junij 10. Anno 1664.

Hyde *Chief Justice.*
Twisden,
Windham,
Keeling.

The King *against* Roche. Ante.

THE Court now allowed the Writ of Scire facias on the motion of Mr. Attorny, in the nature of a Writ of Diſceit; but the parties had before compounded that she should have 16 l. per Annum in lieu of 42 l. recovered by her for her Dower on Mr. Attorneys Arbitration. (1) Deceit.

Baily *against* Hardin.

BAll moved to quash a Writ of Error directed to the Bishop of Judgment in his Cheyny Court, because the Return was of Record and Pleas of our Sovereign Lord the King of his Cheyny Court in Winchester, and so variant, to which Twisden accorded; and the Plaintiff moving it for Expedition, that he might proceed de Recordo quod coram vobis residet, the Court quasht it. (2) Error.

Martin *against* Green.

(3) Admiral.

WIld the Kings Serjeant prayed a Prohibition to the Admiralty on a Libel against a Ship for destroying another Ship by negligence, being driven down by the Tyde, being only a common Action upon the Case, which Hyde doubted, in regard the part Owners of the Ship cannot be known, and so no remedy at Law. But by Twisden and Keeling, this is no colour to give any Jurisdiction where it ought not, but on delivery of the Names of the Owners, the Court awarded a Prohibition.

The King *against* Dale Churchwarden of Spalding.

(4) Parliament.

BArnard moved to quash an Indictment on the Act of Uniformity, because it was said quod cum per Stat. ad Parliament. tent. 14 Car. whereas that was the day only of Prorogation, which the Court agreed ill, the Conclusion being contrà formam Stat. prædict. and so lately in C.B. in an Action upon the Case against an Attorny on 3 Jac. for Fées, such Exception was held good, that being only Prorogation, which was not mentioned: So the Statute of Usury and of Maintenance, 32 H. 8. which was at Parliament. tent. 31 H. 8. so Strange *against* Partridge, Pl. Com. the Offence was for keeping the Church doors shut, whereby the Bells could not be rung, which is only miscarriage, but not within this Statute, or 1 Eliz. so on ringing too often, or unseasonably, but disturbance against this Statute must be in time of Divine Service: But the Record not being in Court, Adjornatur.

Rogers *against* Rogers.

(5) Heir.

MOnday moved to set aside Judgment against an Heir, had by Nihil dicit fairly, for want of a Plea, which was delivered, but not into the Office, nor by signing the Book of the Plaintiffs Attorny, as is used in all General Issues: The Court doubted, in regard that if Execution should be taken of more then the Heir had the day of the Writ, or of his own Lands, the Heir would be put to falsifie and more trouble by remedy against the Sheriff, which would be mischievous; wherefore no inconvenience appearing on the other side, the Court ordered to go to Trial, paying Costs, and that the Judgment by Nil dicit be set aside.

Bois

Siderf. 214. pl. 15. Bois *against* Bois.

IN an Action upon the Case for calling her Whore, per quod she was in danger to lose her Widows Estate, which by Custom of is to be quam diu Casta vixerit, which as in 25 Eliz. Banisters Case, to say of an Heir, He is a Bastard, is actionable, being no colour for it after Verdict. Twisden conceived them alike, so Hyde and Keeling, contrà by Windham; Whore may be one of such a Carriage, and is of no certain signification, as Bastard is: And when a Whore in Oliver's time was to be whipt, the word was not generally actionable; contrà to say she was the Whore of J. S. But the words being, That the Plaintiff was a brazen fac'd Whore, and I will turn her out of her Living, seem to be direct to this end, and so as scandalous as per quod she lost Marriage. (6) Slander.

Adjornatur.

Siderf. 21. pl. 22. Smallbrook *against* Slader. Ante.

THe Court refused to grant a Prohibition till a Copy of the Libel be delivered, in that it is not asked till after Sentence removed by Appeal to the Delegates, for it ought to be granted only when men are in fear of Sentence before Answer by the same Judge, or else the party should have prayed Prohibition to the Delegates before his Answer in the Spiritual Court, for all is removed to them, as a Record out of C. B. hither by Writ of Error: Also per Curiam, the demand ought not to be so as to stop any Proceedings only after Answer, and Prohibition being awarded on false Suggestion, Consultation was awarded. (7) Prohibition.

Sadler *against* Taylor.

Saturday, June 11.

HYde conceived, that Action for mean profits on the Judgment in Ejectment shall be in the name of the Lessee, during his term, which Twisden and Keeling agreed. Windham conceived this is no such Lease as shall estop the Lessor to bring another Action in his own name. Sed Curia, In this Action no Evidence shall be given as to the Right, which must be, if the Action should be in the Lessors name, and therefore he can have no such Remedy: But the parties agreed to try it de novo. (8) Ejectment.

The King *against* Paulet. Ante.

(9) Pasc. THe Defendant demurred to the Indictment on the Stat. 14 Car. 2. 12. which being private, is not found, and so the Court ought to take no notice of it, although the General Title of it be general, as by Mountague, Pl. Com. 65. Hub. 226. Moor 253. Act. Carters Case, Moor 583. 1 Leonard 306. The Statute of Bishops is private; So 18 Eliz. of Colledges is a particular Act, but 18 Eliz. cap. 11. is general, 21 Ed. 4. 56. & 4 Co. 120. b. vide 4 Co. 76. Hollands Case, 23 H. 6. 10. Dyer 27. b. pl. is private; contrà where it is of all Officers in general: But an Act for a whole County is but a particular Act: So in our Case, which is a particular enacting Clause of erecting a Corporation for the Poor, and Workhouses in two Cities, and in some Parishes which are but as Individua, and so is much more private then where it extends to a Species. 2. Indictment will no more lye on this Special Act, had it been found, then for private Nusance to some particular persons. 3. Here are particular Officers imployed, and no penalty set for his default, therefore he cannot be Indicted. Lindly contrà; As to the third, it's a Contempt of the Authority, and so is indictable, whatever the matter be, 3 Cr. 655. Crouders Case, private or publick: As to the first, It's not a private Act distinct, but coupled to the Body of the Act by words, of farther redress of the former mischiefs mentioned generally before, and it's no distinct independent Paragraph. Keeling conceived the Act private, as the Provision for the Poor in the Isle of Foulness in the Statute of 43 Eliz. cap. 2. Also it must be a general Act on which any must be Indicted for disobeying. The King is not trusted for any particular City or Town, but as Members of the whole Kingdom: But Windham and Twisden contrà, especially for the mischief that would else be; for in London or Middlesex the party may doubtless be Indicted on it, for they need not recite their own Laws: Also by Hyde, the Act is fruitless unless it be publick; for a Churchwarden is a publick Officer; and here the King is in a sort concerned, to whom Information is to be made by the Justices: Also the Act for Foulness is but a Proviso, which can never make a general Law private, but this is part of the Body of our Act.

Adjornatur.

Coleman

Coleman *against* Hartcoat.

IF H. pleads as of last Term General Issue, and it be not entred till the next Term, the Defendant may plead de novo, but cannot change the Venue; but on delivering a Declaration on a former Term too late for the Defendant to plead, he may then change the Venue the ensuing Term; ex motione Keeling to change it in Action upon the Case for words, the Court refused it. (10) Days.

The King *against* Corporation of Maidstone.

THe Court conceived this Return Non fuit debito modo Elect. was ill, and against all Presidents, Yelvert. 30. pl. 42. and on good advise, by Twisden, in the Case of this Town before, it was held no fit Return, this being a Negative pregnant, whereby the truth of every Case will be concealed. The Court awarded a Writ to command him to be sworn, or if he had been sworn, to be restored; so in the Case of Hereford, Post. (11) Mandamus.

Arris *against* Bradshaw.

IN Trespass for breaking his House and taking Goods, the Defendant pleads that Chipping-wickham is an ancient Corporation Town, and by Patent of King James, have power to make By-laws, granted to the Mayor, Aldermen and Common Council, for Regulation of the Town, and they ordered that the Plaintiff, presuming to set up a Shop without their Licence, should pay 10 s. per Month, and in default thereof distress, which by Jones is ill, there being no By-law that no Trade shall be used without their Licence in general; no By-law that restrains Trade is good without Special Custom; for by Common Law every man may exercise any Trade, which is restrained by 5 Eliz. cap. 4. to such as serve seven years only: So is 8 Co. 107. Wagganors Case: So 11 Co. 53. 2. It doth appear the Plaintiff was not Free of the Town, but it doth not appear but he might serve Seven years there; so like Hub. 211. the Weavers of Newbury. Also by Twisden, the By-law is only to distrain, and by virtue of that there is a Warrant made by the Mayor to the other Defendant to sell the Distress, this hath been doubted, but held in an Act of Parliament for Sewers, that levying by Distress implyeth Sale; but never in a By-law or Letters Patents, which the Court, præter Windham, agreed: And by Keeling, this (12) Trades.

this By-law is ill; But for the inconvenience, the rest waved any Opinion as to that; but for the last insufficiency, Judgment for the Plaintiff, Nisi.

Hutchinson *against* Sir J. Lenthall.

(13) Officer. THe Court conceived it in their discretion to suspend Sir J. Lenthall the Marshal, or not, from his Office, on prayer of any that had recovered against him, on escape: And here the Debt being the Customers, and contracted in the late times, they refused to sequester him, but left him to his remedy at Law, ex motione Jones.

D'avadge *against* D'avadge. Siderf. 210. pl. 6.

(14) Executors. IN Debt against an Executor, he pleaded plene administravit præter bona not sufficient to pay the Debt in demand, which on general demurrer is held substance, 9 Co. 109. But its held in Hub. 133. Andrews Case to be but form; however, the Plaintiff having here specially demurred, because the certainty of what is left, is not said; But the Plea was, that J. S. hath recoverd against him, ultra quod he had not Goods sufficient to pay the Plaintiff; yet, per Curiam, on a special demurrer, its ill, and ought to be that J. S. had recovered 19 l. &c. ultra quod he hath but 5 s. or nothing. But there being a mistake in the Action, which was entred in Tr. 15. alias prout patet Mich. 14. and the Obligation was dated in Jan. 14. Car. for which cause Nil capiat per Billam was awarded on the Exception of Stroud for the Defendant.

Audly *against* Berry. Det. Br. 100.

(15) Covenant. IN Action of Covenant on Articles of Agrement, whereby the Plaintiff Covenanted to make an Assurance by a day of Lands, as the Counsel of the Defendant shall advise; and on perfecting thereof, the Defendant is to pay 300 l. and 300 l. more generally within three Months when demanded, and now breach being assigned in Non-payment of the whole, the Defendant pleads the Plaintiff had no Estate which he could convey; to which the Plaintiff demurred, in regard this payment is Collateral, and the latter is general, without reference to the former: But, per Curiam, the first depending on the Assurance, the latter must be so that is subsequent: So if no Assurance, nothing is to be paid, and so the Plea of the Defendant is good, although the Plaintiff averreth

averreth he was always ready to perfect it, and that the Defendant never tendered any, nor hath paid, &c. præter Twisden, who conceived its at the Defendants peril to cause an Assurance, and if the Plaintiff refuseth for to convey by Fine, &c. then he is liable, else not: But, per Curiam, this is good in Action by the Defendant for Non-assurance, but here the Action is for the Money, and so the Defendant hath Election to plead, as here, or that he tendred special conveyance by Advice, and the Plaintiff refused. Judgment for the Defendant, Nisi.

Cradock *against* Pococke.

NOrth moved for a Supersedeas, the Defendant by Writ of Priviledge having removed the Suit of the Plaintiff against one Petty, for whom he was surety, an Attachment of Petties Mony in his hands by the custom of London, which the Court granted, in regard the Suit is not directly against the Defendant, who was an Attorny of this Court. (16) Priviledge.

Swain *against* Shin.

ON Errors assigned, its entred quod petit, &c. which is intended to have Certiorari for diminution; but the Defendant having joyned in Error, no Certiorari is necessary; no more is it, unless the party, when he assigns Errors, prayeth it for want of Original, &c. But however, if the Defendant agree that the Secondary shall give Rule for a Certiorari, although none be requisite, yet being granted, there must be four days betwixt the Entry of such Rule in the Office, (till which its no Rule revera) and the Return of it, that are Hall-days; and because there were not, ex motione Glyn the Kings Serjeant, the Court ordered a new Certiorari. (17) Error.

Alcock *against* Herbert Bail of Merry.

Monday, June 13.

IN Writ of Error out of Palace Court, which is to remove the Judgment had against the Principal, cum omnibus ea tangentibus, by vertue whereof the Record of the Bail, which is distinct, is removed; and the Plaintiff now brings a Scire facias here against the Bail; To which Raymond pleaded nul tiel Record, because this is a Collateral Record, and (18) Bail.

and not removed. The Court conceived, that had the Plaintiff brought the Writ of Error, he should not have Scire facias on the Recognizance; contrà here, when all is removed by the Defendant: And so it was resolved, Jones *against* Williams, of Bail in C. B. no Scire facias lieth here, because by Mittimus the Record may be sent from hence back again, which cannot be to Inferior Court, nor Tenorem thereof, as was urged by Jones for the Defendant; so in the Case of Dinchurch and Risan *against* Goodwin, 1 Cr.

Adjornatur.

Petit *against* Conway.

(19) Rent. The Court conceived that Reservation of Rent to the Lessor, and his Assigns, during the Term, shall go to the Heir, as well as reservation during the Term generally; contrà, by Wild, on Mallories Case, 5 Co. 112. On the motion of Mr. Argoll in Arrest of Judgment, in Action of Covenant by the Heir, grounded on Articles of Agreement, whereby the Ancestor of the Plaintiff, on Consideration of the Rent so reserved, was to Lease, and the Defendant by another Article to pay redditum prædict. at Michaelmas and our Lady, and said not during the Term, which, per Curiam, on breach assigned for Non-payment, a year and more shall be intended, as well as half yearly ad usualia Festa generally, shall be intended during the Term.

Archer *against* Bennet.

Tr. 15. Car. 2. Rot. 1704.

Tuesday, June 4.

(20) Appendant. Sidenf. 211. pl. 9. By special Verdict in Ejectment, it was found that Oaker was seised of a Mannor and Messuage, and a Close, and having two Mills on the West side, and of a Bell, which he newly erected upon the other side, then by meats and Bounds divided the Close, and enfeoffs the Plaintiff of the West part of the Close, and the Mill, with the Appurtenances; after assigns the other part of the Close, with the Mannor, unto the Defendant, and whither to these Auncient Mills the Bells will, being severed, pass as appurtenant, having been enjoyed and used with the Bell, by assignment of the Feoffor, who had both for a year, which by common reputation is sufficient to be so accounted parcel: By Bigland for the Plain-

Plaintiff, they shall, this being the intent of the Conveyance, as Hill *against* Grange, Pl. Com. 171. And also the end of the Bell is to serve the Mills, and so may as well be appurtenant, as a Shop to a House, 1 Cr. 17. Brian, 1 Cr. 57. Hern *against* Allen, seem contrà; but there the Verdict found they were never enjoyed together, as appurtenant, or not intended to pass, 1 Cr. 168. Gennings *against* Lake, adjudged in case of the King, that such Grant was good for the joynt enjoyment, 2 Cr. 121. Reignolds *against* Chamberlain, because of the necessary use, Conduit was adjudged to pass as appurtenant to the House, especially being used joyntly by him that had the Inheritance. Any small time is sufficient to cause things in esse to pass in grant, 6 Co. 65. contrà to enable one to prescribe or make Title as appurtenant. Also the Mills are useless without the Bells; and so, as in Hub. Darcy *against* Askwith, they shall pass together. Wilmot for the Defendant, In all the Verdict, the Bell is not found necessary: I agree the cases cited, but ex natura rei, both Mills and Bell being Corporeal, they cannot pass as appurtenant, as in case of a Mannor, which is compounded, as Tirringhams Case, Brief F. 783. Also from the nature of appurtenants, as Fleta lib. 4. cap. pag. The usage here is not above a year, which is not sufficient to make it appurtenant. Also had the demise bëen of the Mills with the Bell appurtenant, it had bëen good, as in Hill and Granges Case, cum terris pertinent. passed the Meadow; but by general words it would not have passed; Br. N. Case 31. 27 H. 8. 2. 3 Cr. 113. is on the same diversity betwixt devise and demise; also as 21 Ed. 3. 2. Snelfords Assize, both being enjoyd by J. S. and he granting away but the Mills only, the other cannot pass as appurtenant: Also they have found the Defendant seised of the Mannor generally, and no other Title for the Plaintiff, so whatever cometh after is superfluous. Keeling conceived strongly it passeth not, being neither found necessary, or belonging to the Mill: Windham accordingly, that the Verdict is short, for it appears not but it is a Lime-kill, and not Bell purposely erected for the use of a Mill, in which case it would have bëen parcel, as a Dovehouse or Conduit is to a Messuage. Also cum pertinentijs is too short, without all Bells appurtenant. Twisden and Hyde accordingly. Judgment for the Defendant, Nisi.

Hopper *against* Hacket.

Pasch. 16 Car. 2. Rot. 42.

(21) Arbitrement. IN Debt on Bond, the Defendant pleads it was for performance of an Award, & nullum fecerunt arbitrium: The Plaintiff sets forth the Award, which was, that the Defendant should pay to the Plaintiff 4 l. for Arrearages of Rent, & erga reparationem Domus: To which the Defendant demurs, because the Submission is of all matters in Controversie, and the Arbitrators have taken notice that there are other differences, and so this Award not going to the whole, is but an award of one side, and so void; and the Court shall not intend that this was the only difference; which, by Twisden, was long doubted in the Case of an Attorny of B. R. one Burbedge: But, per Curiam, there doth not appear there is any other matter in difference unended; and if there were, the Defendant ought to shew, and plead it: And although the Submission recites there were other differences about the possession and standing of Elmes, these are arbitrated for the Defendant, in lieu whereof he is to pay 4 l. &c. which goeth to the whole, for an Award of one particular for the ending of one hundred, is good enough, and reciprocal.

Judgment for the Plaintiff.

In Error, Br. 186. Partridge *against* Walgrave. Ante.

(22) Leet. WIndham conceived that it doth not appear that he that levied the Cottage was a Tenant; but if he were, this Custom to distrain any Goods out of the Grounds of the party amerced were good, which Twisden denied on Dyer But per Curiam, neither of the Exceptions made by Jones are deniable, ut Ballivus Episcopi, being ill; so to say ad Curiam Visc. & Baronis without discrimination.

Judgment for the Plaintiff, Nisi.

Fourquier

Fourquier *againſt* Frazier.

IN Debt on Bond conditioned to pay 4000 Mark Scotch to the Plaintiff, when he ſhall take ſufficient diſcharge from A. and B. of the payment of Legacies; and the Defendant pleads no ſufficient diſcharge was taken from them. The Plaintiff replyeth that he paid the Mony to both, and took an Acquittance from one by the others conſent, teſtifying the Receipt. The Defendant Rejoyns he took no Acquittance from both, which is ill, and therefore the Plaintiff demurred: And by Jones, this is a ſufficient Acquittance; and the Rejoynder ought to have been with Special Plea, or Traverſe of the Acquittance, modo & forma, & proteſtando he did not pay, is not ſufficient. Wild for the Defendant, This is a Condition of a Bond, and therefore muſt be ſuch an Acquittance that may diſcharge againſt both in Fact, and not in Law only, to which the Court inclined, in regard this is but Evidence; and if it were under Seal, yet a diſcharge by one Legatée is no diſcharge againſt the other. Judgment for the Defendant. (23) Legacy.

NOta pro Regula, in Michaelmas and Eaſter Term, they never plead to try the ſame Term on Cepi Corpus, but contrary on Habeas Corpus; but in neither they cannot plead farther then to enter in Hillary or Trinity, by Liveſey Secondary, and the Clerks, in a Caſe where Binks was the Attorny. (24) Trials.

In Debt, Fitz. 92. Garret *againſt* Weeden.

IN debt on Bond, the Defendant pleads it was for performance of an Award, & nullum fecerunt arbitrium. Jones (on Mich. 15 Car. 1. Caps *againſt* Penny, Award adjudged naught in B. R. for not ſaying ready to be delivered by the time, contrary to 1 Cr. 541.) conceived the Award ſet forth in the Plaintiffs Replication, to which the Defendant hath demurred, is naught, becauſe the Submiſſion is ſo, as it be ready to be delivered to the parties by a day; and the Plaintiff ſaith it was made ready to be delivered to the Defendant only, which, per Curiam, is well enough; and the rather becauſe it was farther ſaid, Or to either of the parties requiring the ſame. 2. The Award was to pay Mony by a day, and the Intereſt which is or ſhall be due, without any day certain, which, per Curiam, is well enough. And for the other Exception, it cannot be intended but that it was ready to be delivered to the (25) Arbitrement.

Plaintiff, because he hath brought his Action upon it. Judgment for the Plaintiff. So had it not been said they were ready.

Keys *against* Bredon. Ante. 705

(26) Ejectment. THE Court conceived a Release of Errors obtained of the Casual Ejector by the Lessor, being but fictitious, is void; and although Non est factum were the Issue joyned, the Court set it aside, and made the parties accordingly to try the Right by a time, or assign Errors, or else the Trial may proceed: And the Court ordered a Rule that no such Release be accepted, without leave of the Court.

The King *against* the City of Norwich and Dixe.

Wednesday, June 15.

(77) Peace. Endictment, Fitz. 1. THE Court on view of Presidents, that Conviction by Justice on view might be removed hither by Certiorari, and quashed, conceived that a Fine set by an Order of Session on the Grand Jury, may be hither removed by Certiorari, but not by Writ sent to remove all Orders made at Sessions betwixt the King and the party Indicted, but must be specially betwixt the King and the Grand Jury by particular name especially, because the Return is but by way of Recital of what was done, and no Order returned; also the Return is in English, wherefore the Court would have fined the Clerk of the Peace, but that it was done by advice of Counsel there: But by Keeling, no alias Certiorari can be granted for default in the first Return; the Offence was for not coming to Church, and the Jury would not find the Bill, unless it were proved that the party was at no other Church: But, per Curiam, this was an Offence, and such Negatives is needless: Nor, by Windham, is it necessary to swear the party was not at his Parish Church, but that on diligent search he could not see him there, and that's sufficient to put the Affirmative to be proved by the party Indicted, which the Court also agreed; and this being but an Accusation, the Jury ought to follow the direction of the Court; as if one be kill'd, & constat de persona that did it, if they find it Manslaughter only, they are finable, and ought to find it Murder; but whether this Order might, (as Pasch. 9 Car. per Curiam, and the Case of Alcock) be amended here, the Court were divided; also whether by Writ, or alledging diminution. Adjornatur.

The

The King and Williams *againſt* the Inhabitants of Upwood, &c. Ante.

Thurſday, June 16.

BAldwin for the Plaintiff, The laſt Trial is but of favor to inform the Court, and the Judgment on the Diſtringas is perfect before: Alſo the laſt is not given to the Plaintiff alone, qui ſequitur tam quam, but its alſo given to Sir Tho. Fanſhaw, and he 2 Inſt. 477. 8 Car. 1. B. R. the Caſe of Gibbon 1 Cr. 281. was long argued; and held, that after Diſtringas once awarded, its too late for the party to indict the parties for any Offence contrà formam ſtatuti, or to plead, but the Wills ſhall anſwer: So on the Statute of Wincheſter, the words being quod reſpondeat, is intended by way of Action, and not by Judicial Writ, as here; which is rather a Commiſſion to the Sheriff then Proces; and hereupon the Writ of Enquiry is awarded, on which, if the Wills do not plead, they come too late at the ſecond Diſtringas which hath Fi. facias in it. Twiſden knew no difference betwixt the firſt and ſecond Diſtringas, eſpeccally if the ſecond have no Fi. facias. Keeling ſaid, that it was Noye's Argument on this Statute, but yet the party was, contrary thereto, admitted to plead in that caſe; as well where the Diſtringas conteins Fi. facias as on the Return quæ Damna, which is Judicial, and the Return of Iſſues on the Wills, upon the other part of the Writ of Diſtringas, is the Proces: But after this, on the Diſtringas to repair, and Iſſue taken, that it was not done nocanter, the laſt Jury cannot aſſeſs Damages; And if the Plaintiff will releaſe them, he ſhall have his Execution on the firſt Judgment. Windham held, as in Malleries Caſe in the Star-Chamber, the party may have Action upon the Statute for the Damages found, but having taken this courſe chalked out by this Statute, it would be perillous, ſhould the Defendants have no remedy againſt the firſt Dammages found by Enquiry, if Exceſſive. Hyde, The former exceſſive Dammages is now admitted, but the Defendant might have confeſſed it was done nocanter, and taken that by Proteſtando; and for Plea to ſay the Plaintiff hath not ſuſteined any Damages, which the Court agreed, præter Windham, who conceived the Damages but conſequential, and not to be pleaded to; and the Action upon the (28) Common.

Statute

Statute is purposely to assess the Damages by Jury; but per Curiam, this is meant where the Action is brought before any Enquisition. Judgment for the Plaintiff, Nisi.

Seurl *against* Taylor.

(29) Rent. ON Avowry by Bailiff of the L. Anglesey for Rent-charge, Judgment was had by the Defendant, and now my Lord desired to try the Right, which the Court would not grant, without bringing the Money into Court recovered, and agreed to bring no second Deliverance to procrastinate the cause by Withernam, &c. Adjornatur.

The King *against* Ring. Ante.

(30) Pardon. WInnington for the Defendant, conceived the Coronation Pardon sued after the Conviction, mentioning all Attainders and Convictions of any Felonies, ac etiam, all Forgeries, shall relate to this, as well as if it had been particulary named, being to be expounded beneficially for the Offenders, as auncientlÿ 1 Ed. 3. 17. pl. 5. 11. H. 4. 16 & 48. But at this day, 9 Ed. 4. 48. the Conviction must be taken notice of, as 6 Co. the case of Pardons, so as that the King may be truly informed: So in the case of Goldenprentice in this Court, on the like Pardon, the Court allowed it, Mich. 13 Car. 2. after Conviction: But, per Curiam, this Exception was not then stird, the pardon was of all Razures, &c. and all pains of death and Judgments thereon had, but no licet convictus in this paragraph of Forgery, which, per Curiam, makes the case the stronger against the Defendant. Also Pardon, in case of death, is allowable at any time, but not so of any other Offence, to which this Pardon being Teste before, ought to be pleaded: And, per Curiam, the Defendant cometh now too late to plead it on Assignment of Error, and after Examination thereof.

Adjornatur.

Longvills

Longvills Cafe. In Dower Br. 73.

NEwdigate moved for Amendment of the Aſſignment of Dower, being under value, and on refuſal of an Equal diviſion proferred to him by the Dowager, with liberty to chuſe which two parts he would for the Heir, which the Court ordered, and committed the Sheriff for taking 60 l. pound of the Lady Longvill to execute his Writ of Execution, and Information againſt him. (31) Dower.

Executors of Lowr.

IN Debt on Bond, all are named in the Declaration, and but only one Arreſted, and for him Hall appears as Attorny, and ſtrikes out the names of the other, becauſe he had no Authority for them, and after pleads in Abatement, that there are other Executors not named in the Writ, which the Court ſet aſide, as frivolous, and only to put off Trial, and ordered a Common Bail to be Filed for all, and pleaded in chief: But, by Twiſden, the Statute of 9 Ed. 3. cap. 3. extends not to Executors that come in by Arreſt upon Latitat, quod non fuit negatum. (32) Executor.

Keble and Miller *againſt* Sambroke.

Friday, June 17.

THe Plaintiffs prayed a Prohibition, being Excommunicated in Suit by the Defendants, who were choſen by a Select Veſtry, and ſued in the Arches for the Keyes of the Church, and that they ceaſe the Exerciſe of their Office of Churchwarden, to which by cuſtom they were Elect by the Majority of the Pariſh of Anne-Black-Friers, which hath been auncienty a Pariſh-Church, and the Parſon was not intereſſed in it; which the Court refuſed, becauſe this ſhould have been pleaded, which it was; but however, they would grant none, præter Keeling, who conceived they cannot ſue in the Spiritual Court for the Keyes, or any Goods of the Church. (33) Church.

The

The King and Bell *against* Rant. Ante.

(34) Usury. IN Information on the Statute of Usury, Jones excepted in an Arrest of Judgment, because an Agreement corrupte to take Use for the time past, is not within the Statute, which is for giving day or forbearance which cannot be, the time being past. Twisden and Windham, The Statute is not for the forbearing, but for the forbearance, which may as well refer to time past, as future: Also by Hyde, it being said corrupte aggreatum, the dating of the Bond will not avoid it, especially the Information being grounded on the Receipt, not on the Contract. But by Jones, this makes void the Security, the other hath only penalty annexed: Also the Usurer hath no means to compel the payment of any use

Adjornatur.

Siderf. 212. pl. 11. Leader *against* Chesselin.

(35) Bail. IN Action upon the Case by Bail in the Pallace Court for J. S. at the Defendants Suit, on Agreement to Assign Judgment there, had by the Defendant, if the Plaintiff would pay 3 l. and give Bond for another Sum: Paulet moved in Arrest of Judgment, this being a void Consideration, 3 Cr. 551. Dr. Barrows Case, and Maintenance, and the Judgment not Assignable to a Stranger. Sed curia contrà; this is an Assignment to satisfie a just Debt: Also the Consideration to Assign Debt, Judgment, and all the profit and advantage I may have by it, is good enough. 2. The Colloquium was of Recovery of Judgment, with Costs and Damages, with increase taxand. which, per Curiam, is well enough, for this follows the the Judgment of Course: Judgment for the Plaintiff, Nisi, although this was a Judgment by Nil dicit, which is but an award.

The King *against* Cross and Dabbin, Constables of Axminster. Ante.

d. 204.

(36) In Coron Firzh. 407. seu 405. Siderf. 204. SIderfin excepted to Enquisition super visum corporis, which appears not to be taken by the four next Mills, but only by those of Axminster. 2. Its not said where Brocas per Infortunium dyed. 3. Its not said that the Bell and Bell-Rope prædict, were those that kill'd him, And as to the Matter, admitting these exceptions void; 1. A Bell fixed, falling

ling upon any man, is no Deodand, Indictment F. 27. but only as are prophane, and occasion Mens death: This appears by 4 Ed. 1. De Officio Coronatoris; Banni, in the old Roll of Magna Carta, signifying things accused; which Bells being instituted for pious uses in the Church, cannot be 11 H. 4. 12. by Hulls: As for Bells unfired, there is but one Authority, and that is Coron F. 405. the former words whereof are but the words of the Enquisition, not of the Court: Also although it be not found that the Bell in our Case was fired, yet it must be necessarily so intended, because its found it was ringing, and B. taken by the Rope, and so killed; and being fired, its part of the Church, as a door is of a House, which being on the Hinges is no Deodand by impulse of Wind killing any Man, Coron F. 389. is the words of the Enquisition also, for then the Coroner might enquire how the party fell, from House or Hill, or Ship, &c. Forfeiture F. 20. the Court conceived the Parish a sufficient Hill, and there need no Return of it, although it must be taken by the four next Justices, and so shall be now intended. Windham doubted, 3 Inst. 57. the Bell being intended to be fired, its no Deodand, no more then Door or Wheel, which the Court agreed: So it was resolved of the Grinder of a Windmill, in the Case of Hyde, heretofore Chief Justice, and so of the Fane or Sails, or Stone of a Hill, all which go to make such a Compositum, although it be only laid on, and to be taken asunder; and they denied the case of F. Coron. 389. Also, by Keeling, if one fall upon a piece of Timber by occasion of it, its a Deodand, which the rest denied. The Court favors not Deodands. Adjornatur.

Wheatly *against* Thomas. Ante.

Saturday, June 18.

KEeling, Justice, The Lessor of the Plaintiff is Francis, one of the four Daughters of Sir William, Son of George, the Son of William, the Son of old George Lord Cobham, who, with the others (that are found to be yet living) were restored to Blood only by the Act of 7 Jac. but there is no Title found for the Defendant, but primer possession, which is sufficient, unless the Plaintiff have Title, which she makes as Heir in General Tail of the Body of William, Son of George Lord Cobham, but is Bar'd by Attainder of Henry Lord Cobham, and George, all the remainders being vested by the Act 3 Jac. 1. and the Will, the Act of 7 Jac. is out of (37) Estates.

the Case, and neither makes nor hurts them; and its clear on the Limitation of the Will alone: All which Estates are vested by the Act of 3 Jac. in the Crown, and in compassion to that Family, there is a Grant of the Lands in question to several Sons of George, and their Issue Male; and after a Clause, on which the question is grounded, That after such Estates spent, to be to and for such Uses, Estates and Purposes as are limited in and by the Will, whereby they intend not to create any new Estates, but is all one as if they had said that the Lands shall go to the said five persons, but after that they would limit no farther, but leave the other Estates, as by the Will, without any farther Act, its but expressio eorum quæ tacite insunt, and only declaratory; and the clauses of perpetuity in the Act added to the five Estates, shew the intent of it to be no farther; for it ordains that no Act done shall hinder any Estate to go to the said persons, as limited by the Will. 2. Admit the Act respects this Remainder, yet its void, as Remainder to Heir of person Attainted, who is not capable as Purchasor, and so it cannot be derived to the Lessor of the Plaintiff; although there may be a special Heir in some cases since 26 H. 8. of persons Attainted; But if this be a new Estate, its forfeited, as vested in Henry, who was now living, notwithstanding his Attainder: Had the Remainder been to the Heirs of William, 3 Cr. Douties Case, and Sheffields Case Hub. it had been good to the Plaintiff, had Henry been dead; so 8 Co. Digbies Case for 26 H. 8. only restrains Westm. 2. to such Estates whereof the person Attainted was seised at the time of Attainder, or at any time after. Also I agree the case of Lit. good Law, but the grounds thereof are fallible; for the King, by such Grant, shall not enfranchise a Villain, no more then he shall make Corporation by Grant probis hominibus: Also any Act of Parliament is but as Conveyance, which can never enure, as a Restitution in Blood, or a Naturalization: Also this disability could not be foreseen by the Act, because Henry was not at the time of the Will born; so is like Remainder limited to the Heir Attaint of J. S. who is person able, as William is here, without taking notice whom he should be which vests in J. S. as 10 Co. 77. and shall go to the Crown, notwithstanding J. S. hath other Sons.

2. Windham conceived the point shortly on the Act of Parliament, whether the Acts do remove the Attainder which stands in the way of the Lessors of the Plaintiff, who are agreed Heirs by the Will; and the Acts do confirm the Attainder as to all Lands forfeited, but after by Proviso, as to the

Man-

Manor in question of Cooling is qualified by Limitations to several in other manner than by the Will, and after by a general Clause, enacts, That after the Limitations specially recited, shall go according to the Will, which sets afoot the Will again as to all persons claiming by it, as if an Act should confirm the Attainder of J. S. as to the Forfeiture of all his Lands, except the Manor of A. in which Case the Attainder works not at all on A. and this is the greatest Elegancie of expression, being a Clause opposed to the former, there have been many Presidents hereof in Co. 3 Inst. without any restoring in blood, because it's in the same Act; and the words notwithstanding this Act, &c.) in this case are needless. Also it was never the mind to set up all the Estates in the Will, but only quoad this Manor, which was not toucht by the Attainder; for the words had been idle, had they intended only to set up the Will generally, and not in opposition to the former words, which specified what should be forfeited. 3 Inst. 241. Acts of Mercy are most favoured against the Kings Prerogative: Also a Gift by Parliament to the Heir of J. S. who is person attainted, is good, and must be intended such person as might have been his Heir, being only a description of the person, à Fortiori in our Case, where the Attainder is only quoad hoc, and so conceived Judgment ought to be for the Plaintiff.

3. Twisden ad idem, Henry had only an Estate Tail vested in him, and a Remainder as general Heir of the body of William, both which are forfeited by his Attainder, but none of the other Remainders to the other Sons, Pl. Com. 556. Walsinghams Case, are touched by the Attainder, but cannot take till the others spent: But the Act of 3 Jac. by the words, doth remove the Attainder, as well as if the persons had been particularly named, as 6 Co. 18. 2 Cr. 39. 54. and make the persons in by the Act, not by the Will; and is all one as if the Act had said the Estates should be enjoyed by such persons as are named in the Will; also the Estates are limited of this Manor for such Estates Tail which were in the Will, which were vested only in Henry, and so it's all one as if it had been named, in which Case the Act of Parliament may enable him, although private Conveyance cannot, nor by bare Gift to person attainted, would not enable him to retain: But here the Act confirms the Attainder, as to all other Lands, except the Manor of Cooling, and so would be idle if Henry should not, as he might, yet that the Heirs of William should hold and enjoy these Lands according to the Will: There is no difference betwixt this and the Statute of Westm. 2. which preserves the Estate of the person attainted as to Issue, although not as to

the person attainted: Also the King by Patent might have granted the Estates limited by the Will in omnibus, and so an Act of Parliament was needless, unless it were to preserve this Manor in Remainder to the Heirs of William; and it appears through the Act, that as great care was taken of the Remainders in the Will, as of the Estates forfeited, and did not leave them as things regardless, nor regard whether Henry and George were dead at the time, or not, nor was it material. Hyde Chief Justice ad idem; The only doubt that stuck with him was the Attainder of Henry, who had all the Estates in him, which was clearly solved by Windham. Also the Will in this case is parcel of the Act of Parliament, as well as if every particular had been expressed in the Act, and the Attainder doth not hinder as to these Lands, because they are excepted in the Act of 3 Jac. and the Law, as F.N.B. 33. supplyeth all necessary Incidents to the enjoyment of those Lands, 10 H. 7. 23. So by Restitution by Parliament H. may have Trespass against the Kings Patentee for his Entry, although it were by Title, which is as inconsistent with the Rules of Law as our Case: So for Grantee of Advowson to have Quare Impedit without former Presentation, as 21 Ed. 4. 1. & 4. Also had the words been, that all the Sons of William should take, the persons attainted shall hold, although they be not restored in blood thereby; for now, as in our Case, there is no use thereof, for the Attainder doth never affect these Lands as it doth the rest, but intended them as a support for them, and so quoad hoc takes away their Incapacities; and that this was their intent is declared by 7 Jac. Judgment for the Plaintiff.

35 H. 6. 57. pl. 2. per Littleton. 2 Cr. 145. 10 Co. 64.

Win *against* Lloyd. Ante.

(38) Wales. Siderf. 213. pl. 12.

HYde Chief Justice declared the Opinion of the Court, because they were all agreed that Judgment ought to be affirmed: Common Recoveries being common Assurances, shall be supported as far as the Rules of Law do allow. And here doth appear a general Warrant of Attorny on the Record, which shall be intended now done according to Commission, although another be particularly mentioned before.

Alcock

Alcock *against* Manucaptors of Merry. Ante.

Monday, June 20.

IN Scire Facias against them on removal (of Judgment had below against Merry) by Writ of Error, cum omnibus ea tangent. the Defendants plead Nul tiel Record, supposing that the Bail is not removed hither by this Scire facias, but Hutt. 117. Risam *against* Goodwin, the difference is taken betwixt a Certiorari which is voluntary, 2 Inst. 23. c. and a Scire Facias, in that Case this Court will not be a means to execute their Judgments; contrà when the Record is Judicially come in hither, which the Court agreed. And Judgment for the Plaintiff. (39) Bail. Siderf. 213. pl. 13.

The King *against* Paulin. Ante.

OFfly conceived no Indictment lay on a private Act, no more then for Nusance, 3 Cr. 90. Willoughbies Case, and this is so, like the Act, 3 Inst. 160. although the Consequences thereof may be publick, for this is private, because as 4 Co. Carter *against* it concerns speciem Infimam, so this Statute; but the Act of Sheriffs being Speciem intermediam, it was special in a generalty; and in all Cases, as Dyer 27. it's the Species, not the Quality or Number of Persons that makes an Act publick or private: Also such Acts as concern the King in his Honour, joyned with his Interest, are publick; but contrà where his Honour only is concerned. Also here, as 1 Leonard 323. Green *against* an Action upon the Case is a proper remedy, the Churchwardens being to this purpose only Ministerial Officers. Keeling conceived clearly no Indictment lyeth on a private Act; and this Act, if it only concerned London, is so; so of an Act concerning all the Cities of England, because it contains only Individua under it: But this Act is a general Law, and concerns the whole Kingdom, and the particular Provisions are but as Mediums to the same end, and take not off from the generality of it: So is the Act of the same time for High-ways. The Court agreed it a general Law. Judgment for the King. (40) Poor. Yelvert. 108. 5 Co. Elmes's Case.

Collins

Collins *against* Fletcher.

(41) Trades. IN debt on Bond, the Court cited in the Case of Dixon *against* Williams, Judgment affirmed in an Action for not finding the Defendant with meat and drink, &c. to which the Defendant pleads he found him, &c. till such a day, the Plaintiff being his Servant, departed into a Foreign County, the Action being laid in London, which was resolved ought to be sworn: But however, the Action being transitory, the Defendant shall not by any thing transitory alter the Visne, but ought, as in the Case at Bar, alledge that the Ship was cast away, &c. at S. Mary de Arcub. in Warda de Cheap, in the same County the Action is brought; the Condition of the Bond being, that in case the Ship were cast away in the Voyage, and did not return, it should be void: The Action was laid in London, and the Defendant pleaded that she was cast away at Falmouth, which they held naught; and had the Plea been local, it ought to be sworn. The Court ordered the Defendant to plead this day, as he will stand to it, or Judgment for the Plaintiff.

Hatton *against* Mascue.
Mich. 15 Car. 2. Rot. 703.

(42) Executors. ADministration is granted to one Executor during the Minority of another, 5 Co. 29. and he in his own Name brings a Scire facias against the Defendant, on Recovery in Scire facias had by the Testator as Executor of Ascue, who recovered against him, which, by Jones for the Plaintiff, is good enough, and without question, which the Court agreed: So Knights Case, 3 Leonard 278. pl. 367. if an Administrator, during Minority recover, the Executors at full age may have Scire facias thereon. Judgment for the Plaintiff on demurrer of the Defendant to the Scire facias.

Nichol *against* Hacket Executor of Woodly.

(43) Assets. IN debt against the Defendant as Executor, he pleads that there were several Judgments, ultrà quod he hath nothing to satisfie, The Plaintiff saith they were all paid by the said Defendant, and set on foot against him by Fraud and Covin of the Defendant, not saying the said Judgments had do remain on Record yet unsatisfied; to which the Defendant demurrs: The Court ordered to stay, in order to be amended.

Armin

Armin *against* Bowe.

IN an Action of Covenant on Demise of Freestone Quarry to the Defendant, the Defendant Covenants not to digg in any other part of the Common, and now breach being assigned in digging, the Defendant pleads non locavit the Quarry prædict. to which the Plaintiff demurs, the demise being by Indenture, and the Covenant Collateral: The Court agreed the Plea frivolous. Judgment for the Plaintiff, Nisi. (44) Covenant.

Justice Tyrel *against* Hatch.

Tuesday, June 21.

HE prayed Good-behaviour against the Defendant, Vicar of D. for praying in his Pulpit for Sir William Herbert, who prosecuted a Petition for a Pension to the Vicar from the Church of Lincoln, to which the Plaintiff was Tenant, and was over-ruled by the Delegates of the Council-Board, yet the Vicar preacht up his cause, and said, Devourers of Church Lands never thrived to the third Generation, which the Court conceived a High Scandal, and bound him to his Good behaviour. (45) Peace.

The King *against* Buckenham.

ON Information against him for striking one Hurlestone in Westminster-Hall, he was Convicted, and the Court Imprisoned him during Life, that he forfeit his Lands during Life, and all his Goods, and have his right hand strook off in the Pallace Yard. Wild, the Kings Serjeant, as amicus curiæ, prayed for the King, that the Prosecutor might be bound to Good behaviour for his provocation; which the Court would have done, but that it did not appear on the Evidence, but ordered Affidavits to be made thereon. (46) In Coron. Fitzh. 282. 280. See 1 Cr. 373. pl. 442. Sir *William Wallers Case.* 12 Co. 71. Oldfield. Siderf. 211. pl. 8. M. 22 Ed. 3. 43. pl. 26.

Snow

In Deviſe Br. 1. Snow *againſt* Cutler. Ante.

Tr. 15 Car. 2. Rot. 1704.

(47) Ejectment. IN Ejectment at Bar, on the Leaſe of Sir Henry Cholmly, of Lands, by the name of Moiety, of which Baron & Feme were ſeiſed of Copihold to them, and his Heirs; and ſo ſeiſed, he ſurrendred to the uſe of William, and deviſed my Lands and Houſes in H. which was my Wives, and now is for her Life, and then to my Heirs; I give and bequeath all my Right, Title, and Intereſt, to the Heirs of the Body of my Wife, if he or they ſhall live to be fourteen years of age: But for want of ſuch Heirs, then unto William, Jacob, and his Heirs for ever; ſhe after the Deviſors death hath Iſſue, which at her death is fourteen.

1. Paulet for the Plaintiff made the only queſtion, Whither this were a good Executory Deviſe to the Leſſor of the Plaintiff, who is found Heir-Male of the Feme, and he conceived it was, the intent being the Heir ſhould enjoy it, during the Life of the Wife; and that if ſhe left Iſſue above fourteen at her death, it ſhould be executed to ſuch, elſe not, as Tr. 51 Rot. 1350. Jay *againſt* Jay B. R. eſpecially becauſe notice is taken of them, as the Wives Auncient Inheritance, and as the meritorious cauſe of his preferring her Heirs of her Body before Jacob his own Kinſman. 2. The finding the leſſor of the Plaintiff under fourteen at the death of th Wife, but that he lived after fourteen, doth not hinder but that the deviſe may be executed to him, for to ſuch intent it had been more proper to deviſe to his Heirs, &c. when he ſhould come to fourteen, for this is but a deſcription, and no ſuch contingent: Alſo the deviſe is not to the Iſſue, but to the Heirs of the Wife, which is a name of deſcription only, and all one as if it had been to her Heir after her deceaſe; in which caſe clearly the Heir ſhould have took notwithſtanding this, if in C. B. 1655 Fermer *againſt* Faſſet, deviſe, that if Child (with which Feme was inſeint) ſhould be born, he ſhall have a ſhare with the reſt, adjudged as good a deviſe as to Infant in ventre ſa mere: So in Bate *againſt* Amhurſt, in C. B. Mich. 15 Car. 2. deviſe by Amhurſt to the Heirs of the Body of J. S. (taking ſpecial notice that J. S. had no Heirs at the time) is good to after born Iſſue. 3. As to the Recovery ſuffered by the Wife in the Court of the Manor, as Blunket *againſt* Holmes, it doth not hurt this Executory deviſe, being ſuffered before the Heir come to fourteen years of age; So Mannings Caſe Co.

2. Scrogs

2. Scrogs for the Defendant, That (Dy. 304. is not warranted by the Roll) this is a devise to such as were not in being, but on Contingent; also there is another Contingent to make the devise effectual, viz. that he live to fourteen: An executory devise hath always a dependance on some particular Estate, but this hath none, but is issuant immediately out of the Reversion, and to pass in præsenti. Also had she had two Daughters, one above another under fourteen, this devise could never have taken effect, no more here. Keeling held the devise void, there being no devisee, as Archers Case, devise to A. for life, Remainder to the Heirs of J. S. is destroyed by Feoffment made by A. Also this devise of Reversions or Remainder, as Counden *against* Clerk, Hub. must have some particular Estate precedent to any Contingent, and to some person by 32 H. 8. to which the Court inclined: And as to the Recovery it's doubtful. Adjornatur.

Locke *against* Etherington. Ante.

Hill. 15 Car. 2. Rot. 684.

(48) The Court on Conference with the Judges and Barons of the Exchequer, conceived that this debt is pardoned, as well in the hands of the Debtor as of Felo de se, because the King pardons all he can or may pardon; and the constant practice of the Exchequer is to discharge it, being a thing in action, and as such vested in the Crown, and so discharged by general words of Release; but Goods vested must be specially regranted; but persons Utlawed, or Manslayers, being pardoned, are made able again to sue their Debtors. Pardon.

Adjornatur 157. pl. 60.

Fitzherbert *against* Hind.

(49) Award to pay Mony in or at the House of J. S. The Plaintiff sayeth it was not paid at the House, which, per Curiam, is well enough; and if it were paid in the House, it may be given in Evidence on Issue that it was paid at, &c. Judgment for the Plaintiff in Debt on Bond. Arbitrement.

Pride *against* Atwick. Ante.

(50) Deviſe. IN Ejectment, the Court were of Opinion for the Plaintiff, that the Lands demiſed for five years to the wife, is to be divided between Daniel and John, as Survivors, the Survivor whereof is the Defendant, John having only for life, it being not found that W. had no Iſſue, it cannot go to his Iſſue, and on deviſe that on the death of any of his Sons within five years (to be divided) without ſaying what ſhould be divided, muſt be intended the Lands to be divided.

Adjornatur.

Dudly *againſt* Cole.

(51) Arbitrement, Br. 39. IN an Action for Taylors work, the Defendant pleaded an Award that if the Plaintiff made the work, the Defendant ſhould pay, which, per Curiam, being uncompulſory is void, and although it were ouſter, that the parties ſhould give mutually general Releaſes, which of it ſelf is ſufficient, and independent, yet per Curiam, it's ill, for in this caſe the whole Award muſt be good; but if in Action on an Award any part be good, eſpecially if that on which breach is aſſigned be ſo, it's ſufficient. Judgment for the Plaintiff, Niſi.

Nichol *againſt* Hacket. Ante.

(52) Amendment. THe Court ordered an Amendment of the Plea, the Paper Book being right.

Rutter *againſt* Hebden and Williams.

Wedneſday, June 22.

(53) Proof. KEeling conceived it no Evidence to ſwear what J. S. (not concerned, but as Witneſs in the Suit) ſaid, becauſe J. S. was not on his Oath when he ſaid it: Sed Curia contrà, that it's good Evidence; and on denial in another Trial in Court by J. S. the credit is left to the Jury, in Information for tampering with Jury.

Keyes

Keyes *against* Bredon. Ante.

THe Iſſue that H. that was Caſual Ejector, and gave Releaſe of Errors, was not the ſame perſon, being tried the Court would not ſuffer the Defendant to aſſign Error, but conceived he was barred now. (54) Ejectment.

Hole *againſt* Atherton Manucaptors of Wecks.

THe Bail of Hicks at the Suit of Hole, bring Error tam in Redditione Judicij againſt the Principal, as in adjudicatione executionis by Fieri facias againſt the Bail in Inferiour Court, by which all was removed: And now in Scire facias againſt the Bail, he pleads Nul tiel Record: And Windham conceived 3 Cr. Blodwells Caſe, that the Execution alone cannot be removed without the Judgment on which it depends; and although no Error can by him be aſſigned on it, which the Court agreed; yet by Jones, no Scire facias lyeth againſt the Bail without the Judgment be had againſt them: But, per Curiam, the Writ of Error, ſi Judicium redditum ſit, may be intended the Judgment againſt the Principal, which the Bail may thereby remove, if they be in danger by an Award of Execution: But to the Conſeguence Adjornatur. (55) Bail.

Snow *againſt* Cooly.

THe Court, ex motione Sir Jeoffry Palmer, ordered that a new Declaration delivered on the Eſſoin-day, ſhould be ſufficient (the old one being delivered before) but the Leſſee dying, the name was thus changed, there being ſufficient notice, and this the act of God, which ſhall not prejudice, as by Twiſden, the Court will allow Plea of Auncient Demean the ſame Term, contrary to their ordinary Rules in Ejectment. (56) Days.

The King *againſt* Reynor.

Thurſday, June 23.

HE was Indicted of Battery, and Judgment againſt him at the Seſſions in Middleſex, and now aſſigns Error in the Judgment, which was to pay A. 100 l. Fine, to be taken, and to be of Good behaviour towards the King, which being without time is ill, by Jones, which Keeling agreed; contrà (57) Peace. Sider. 214. pl. 14.

per Curiam: Also if it be not said by whom, it shall be intended by the Court; but the Judgment being compleat, & ulterius ordinatum, that he find Sureties, &c. it's well enough, and this no part thereof. Judgment affirmed.

The King *against* King. Ante.

(58) Forgery. THe Indictment being removed by Error, Lindly waived the Pardon, and assigned that the Deed supposed is a Lease to Joseph, Habendum to John, with a Release grant &c. to Joseph the Defendant, dated in Nov. 1651. and the Enrollment, which was supposed to be forged, was in April 1652. but it's acknowledged eleven Months after, and so the Estate of Keymer the Bargainée is not in Jeopardy, for the Acknowledgment is the ground of the Enrollment: The Court conceived the Pardon ill, but as to the Errors Adjornatur.

Debt, Br. 100. Audly *against* Berry. Ante.

(59) Covenant. TWisden held the Plea ill, the Articles being to convey by 25 Dec. following, and the Defendant to pay on perfecting Assurances 300 l. and 300 l. at a day certain after, and now in Covenant on these Articles, the Defendant pleads the Plaintiff hath not, at time of Covenant, or after, any Right or Estate, to which the Plaintiff demurreth; and he may; for although the Plaintiff hath no Estate, yet if he be required to convey, and doth not then do it by the time, the Covenant is broken, for the Estate of the Covenantor may be in trust, & that need not be defeated till the Assurance be required by the other side, whose Counsel is to advise it; and the saying licet he was ready at all times to assure, viz. to the first of October, 12 Car. 2. whereas the Articles are dated in Octob. 1659. to convey by 25 Dec. following, is well enough, for the day in this case is immaterial, and the breach assigned by Non-payment 1 Oct. prædict. is not material, although Issue were thereupon, the Defendant having committed the first fault by not requiring an Assurance, and so his Plea, That the Plaintiff hath no Estate, is idle: Sed Curia contrà, That the Plea is good; but they agrée the Covenantor may enable himself by the time limited, but yet he must, as 5 Co. 21. be enabled by the day, else the Counsel can never advise any Conveyance, 1 Inst. also the manifest intent of the parties was not to pay Mony but on Assurance. Adjornatur.

22 H. 6. 43. pl. 22.

Locke

Locke *against* Etherington. Ante 753. pl. 48.

IN Scire Facias against the Defendant to have Execution of Judgment of 2000 l. Recovered against him by Tooms felo de se, found by Enquisition and so actually vested in the King. The Defendant pleads 12 Car. 2. 1. §. 5 & 7. of the General Pardon and Oblivion; to which the Plaintiff demurs, the Defendant having not averr'd himself a Subject at the time of the passing of the Act, but only that he is modo (which must be intended at the time of the Plea only) like 2 Cr. 215. pl. 12. and 1 R. 3. cap. 4 H. 7. 8. 6 H. 7. 6. 16 H. 7. 2. Pl. Com. 376. where the disability is, in that part of the Act which the Defendant pleads, he must shew himself able, 29 Eliz. Zouch *against* Bamfield C. B. 1 Leond. 24. pl. 102. 32 H. 8. of Leases by Tenant in Tail, it need not be averr'd he were of full age, which is for the particular reason of the purview; but where the disability is in any other part of the Act, its well enough, and the Defendant need not shew his ability: As to the Matter, it could not be the intent of the Act that this Debt should be pardoned, the general words, all Judgments being intended of the former particulars, although they should have been prosecuted to Judgment; for when Acts begin with special words, as 2 Co. Archbishop of Canterbury, and concluded with general words, they shall be something restrained, as well as when it begins with general words, and concludes with special words: Also there are no words in the Act, of Debts, Bonds or Recognizances. Also there is another Clause, That all Bonds, Recognizances for any Debts aforesaid, shall be pardoned, which implieth that no other shall be so: And §. 7. which is as large as this Clause, and declaratory of it, doth shew the intent of the Parliament: And that this Debt is not within this Clause, is apparent: Also it would be against the nature of the Pardon, which was intended only for such persons as had made themselves liable to the King, and not to take away the Kings power of making Restitution to them: Also every Outlawed person, would by such Pardon, be discharged from all their Debts owing them; and this is not like the Kings proper Debt; or Debts assigned, especially if for any of the Causes mentioned in §. 5. The Case of St. George Binion will rather farther us, for he being the Kings Receiver, and a Debt of his Debtor seised into the Kings hands in aid, and ruled that this was not Pardoned. Winnington for the Defendant, that this §. 7. doth refer to the first, all Offences and Debts not excepted: The Act (60) Pardon.

Act intended not to releaſe the debt of any private perſon, but only ſo much as was in the King: Alſo theſe words of Releaſe, 1 Co. 54. b. ſhall operate as large as other Releaſe, and not only to ſuch things as the word Pardon extends to remit: The Caſe of Sir G. B. The King *againſt* Tourner, the Court conceived that very debt had been pardoned, had it not been for the particular exception of it in the Act. 2. The Plaintiff is not well entitled by grant of omnia jura, credita, bona & catalla, as for debita Judgment, without ſpecial naming, will not paſs. Twiſden on Caudryes Caſe conceived they ſhould, had it been general, be intended natural born Subjects: Windham agreed in a Special Verdict, but in pleading, the Defendant ought to ſhew he is ſubject: Keeling, Subject ſhall be intended natus, and not factus, and ſo the Plea good; and the matter of Utlary is not like this; for by Pardon of Utlary, the party is reſtored in integrum, and enabled to ſue, which felo de ſe cannot be. Hyde held the pleading ill, being modo ſubditus; So Twiſden and Windham.

Adjornatur.

Haward *againſt* Draydon.

(61) Error. THe Court contrà Twiſden, conceived that Error lieth in the Eſchequer Chamber on Judgment in Scire facias againſt Executors, if it be aſſigned tam in redditione Judicij againſt the Principal, as in adjudicatione executionis againſt the Bail; and ſo by Jones, it hath been reſolved, not in Adjudicatione Executionis only.

Bois *againſt* Bois. Ante.

(62) Slander. THou art a Whore, and I will throw thee out of thy living, per quod ſhe was likely to loſe her Widows Eſtate in a Mannor, whereof the Defendant knew the cuſtom, per Curiam, is Actionable, the words being coupled to the intent; Judgment for the Plaintiff: But it appearing the words were ſpoken at ſeveral times; at one, that ſhe was a Whore, and a Brazen faced Whore only; and after, the words above alledged, and intire Damages, which, per Curiam, is ill. Whore alone being not Actionable: Adjornatur.

King

The King *against* Bowers.

COleman moved in Arrest of Judgment on Indictment against Alien, for using the Trade of a Goldsmith, removed hither from the Old Baily, by Certiorari; 1. Because its only said contra formam Statuti, but sheweth not whither as Master or Servant. Adjornatur. (63) Alien.

Hanson *against* Noke.

AFter Execution in Pallace Court in Sc. fa. awarded on 2 Nichils *against* Bail, he brings Error of the Judgment against the principal as in Adjudicatione Executionis against him, the Errors assigned was that there was no Capias, which, by Twisden, is ill, and ought to come in by Plea: And the Assignment of Error in the principal Judgment is but Surplusage, Hyde and Keeling held it well of Capias after Judgment, for without it, there is no Warrant of Scire facias. Windham and the Clerks conceived it only Proces, and never certified out of Inferior Court or Superior, to which all agreed; and that the Bail should have pleaded below, before Execution awarded against him, Judgment Affirmed. (64) Bail.

Charlton *against* Fine. Amendment Br. 7. *Post 766*

IN Debt on Bond, condition to pay Money at several days, The Defendant pleaded particular payments according to the condition; the Plaintiff replieth, that 1 Cr. 164. Dunscomb, he did not pay at such a day certain, & hoc paratus est verificare: To which Williams demurred generally; the Court agreed the Replication ill, and ought to be & de hoc ponit se super patriam; but on performance generally pleaded, the Plaintiff may reply with particular Breach, & hoc paratus, &c. and leave the Issue to the Defendant: Also Twisden agreed this is substance, and need not be specially demurred to; Sed curia contrà; Want of averment, where its necessary, is substance; but contrà of a Male conclusion, as here hoc paratus for de hoc ponit se super patriam. Adjornatur. (65) Payment.

Woodcot

In Condition, Br. 129. Woodcot *against* Cole.

(66) Condition.

IN debt on Bond, Condition to give an accompt of all Moneys gathered by virtue of a Brief granted to the Mayor and Jurats of Graves Inn: On Oyer demanded, the Defendant pleaded he gave accompt of all such Moneys. The Plaintiff replyeth, that he hath received several Sums, for which he hath given no accompt: To which the Defendant demurreth, because there is no particular Sum certain charged on the Defendant, which by Jones for the Plaintiff, is well enough, the breach being not assigned in Non-payment, but in not accompting on particular request, which by the Bond he is to do, whether he doth receive any Mony, or not. Windham held the barr naught, as 6 H. 7. 6. by Wood, because the Defendant ought to have specified what he had received of all, which he hath accompted; or else, as 6 Ed. 4. 1. pl. 4. to say he hath received nothing, and this being ill, the Defendant having demurred to the Plaintiffs Replication, Judgment ought to be for the Plaintiff, which Hyde agreed, so Keeling; Twisden contrà, Either way is well enough, and the Plaintiff ought to assign sufficient breach, that the Defendant hath received so much of J. S. for which he hath not accompted for; thus the Receipts in every County in England will come in Issue: But, per Curiam, the certainty ought to be made by the Defendant. Judgment for the Plaintiff, Nisi.

Price *against* Hill.

(67) Lieu.

THe Court now conceived that quod cum indebitatus infrà Jurisdict. Curiæ pro Mercimonijs prius venditis (not saying where) is ill out of Inferiour Court at Wallingford, because in such Courts the Jury should Enquire of the Contract, which they cannot do if Foreign; and the Court will not intend the contrary, this being assigned for Error. Judgment Reverst.

Middleton *against* Manucaptors of Sylvester, &c.

IN Scire facias the Defendant Tibbot pleads, that before the issuing forth of any Writ of Scire facias the principal was committed to the Marshal in exonerat. Manucapt. Chamberlain & T. & hoc paratus est verificare, to which the Plaintiff demurreth, because it's not said prout patet per Recordum: Sed per Curiam, it's well enough, none being to be discharged by Committitur entred in the Marshals Book; nor shall the Trial be by the Record only, although that be Evidence: But by Twisden, there is never any Record made, unless he be committed in exoneratione of the Bail; and all the Presidents are, that this is triable by the Record: So had it been reddidit se, which is the most usual Entry, the Court agreed the reddidit se triable by Record, but Committitur may be by any Judge in his Chamber (as this was) which is only fact and triable per Pais. Adjornatur. (68) Bail. Siderf. 216.

Siderf. 216. pl. 20. Thacker *against* How.

IN Trespass, the Defendant pleads quoad vi & armis non Culp. and saith not, & de hoc ponit se super patriam, which per Curiam is but form, and on general demurrer good enough. Judgment for the Defendant. Post 764. pl. 77. (69) Issue.

Wadsworth *against* Guy.

IN an Action of Covenant by an Apprentice against the Widow of his Master, which was to instruct him, and cause him to be instructed in the Art of a Sadler, and find him Meat and Drink for and during the said term of Seven years: The breach was assigned in turning him away contrary to his will, & sic conventionem fregit: To which the Defendant demurred generally; for although the Defendants Executors be bound to find Meat and Drink, yet the breach must be assigned in the Default hereof, and not thus generally, & sic, &c. Hyde conceived this general Covenant to instruct, is not gone by his death, although there be no particular Custom, as in London, especially since 5 Eliz. to which the Court inclined. Adjornatur. (70) Trades. Siderf. 216. pl. 21.

Page *against* Clerke.

(71) Slander. P. is one of the Grand Traitors in Leycestershire, and proclaimed the King a Traytor, spoken at several times: The Defendant pleads Not-guilty to the first part, and to the last justifieth. The Plaintiff sheweth it to be done by Colour of the pretensed powers, and sheweth the Act of Oblivion; to which the Defendant demurreth, on Hub. 294. Searls Case; and per Curiam, the Pardon taketh away only the Scandal but not the Fact, but that still remains, as to say H. (after Pardon) Stole any thing, or that Richard Cromwell took on him the Protectorship which is but a relation of Fact; præter Keeling, who conceived this a reproach and Actionable, to say H. was a Thief, Hub. Cuddington *against* Wilkins 82. is not Actionable; but if it be, although there be 10l. given by the Act, that takes not away remedy by Common Law.

Adjornatur.

Woodly Haydon. Ante.

(72) Assets. The keeping the Judgments on foot by fraud, must be Traverst, and whither they be paid or not is but Evidence: And although it be said paid to the Defendant, against whom the Judgment (Brandon *against* Haidon) was, which is insensible; yet payment being not necessary, its well enough.

Smalbrook *against* Slader.

Monday, June 27.

(73) Forgery. Wild prayed a Prohibition on Suggestion, that Libel was for forging Letters of Ordination and putting the Bishops Seal, which, by Hyde is meer Spiritual. 2. It was for Perjury, which being but incident questions, and the matter Spiritual, by Windham its well enough, but the principal Article being that he was Laicus, and on that he is deprived, and so the other offences are not Enquirable: Also by Windham, the Ordinary may deprive the Clerk for any excess whatsoever, be it Temporal or Spiritual, as they might degrade for Murder, although they cannot proceed after Pardon, as Hub. and the Sentence here is grounded only upon the being lay, and takes no notice of other Articles. Twisden and Keeling, conceived that were the Libel principally on the Forgery, if they give any punishment

ment beside deprivation, Prohibition lieth; but here per Curiam it was denied.

Chambers *against* Hunter.

JOnes prayed a Repleader in an Action of Covenant for Non-payment of Freight: The Defendant pleaded another Covenant in bar, that the Ship was to be brought as near the City of London as could be, on which the Plaintiff took Issue, and Verdict for the Defendant, in which case the Plea being insufficient, the Defendant can never have Judgment, as payment pleaded to single Bill found for the Defendant, 5 Co. 43. Nichols, Det. Br. 8. and in this Case the Fraight is to be paid on discharge of the Ship, and another Covenant to discharge as near as could be, &c. which are Collateral Covenants. The Court agreed the difference. (74) Covenant.

Sed Adjornatur.

Cole *against* Sutton. Ante.

IN Transitory Action of Covenant, the Defendant pleaded a Foreign Plea, that the Ship was cast away at Falmouth, to which (being done to put off a Trial, and not Sworn) the Plaintiff demurs specially, and the Defendant joynd in demurrer, on Dixons Case. Keeling conceived, that unless there be special local Cause, the Defendant cannot alter the place where the Action is laid; but it being only a Record, the Court ordered it to be read that the Defendant might not change his Plea, but that it might be peremptory. (75) Lieu.

Adjornatur.

POwis prayed a Prohibition to the Bishop of York, on Suggestion that Title of Treasurership of D. & Ch. which the King had granted to Sir H. Bellasis a Lay-hand, and to which a peculiar Jurisdiction was annexed, which the Court denied, because Lay-hand, without Act of Parliament, is not capable of such Office; but however, the peculiar being Jurisdiction Spiritual, is appendant to the Office, not to the Corporations or Demean; but for the difficulty day was given to shew cause against Prohibition. Adjornatur. (76) Ordinary.

Thacker *against* How. Ante 761. pl. 69.

(77) Nonsuit. WIlliams prayed leave to discontinue, which the Court refused, the Actions being frivolous, and the Opinion of the Court given on demurrer for the Defendant.

Pinder *against* Coots.

(78) Prohibition. BIgland prayed a Prohibition to the Arches, for the Plaintiff being Excommunicated in a Peculiar, appeals to the Arches, Suggesting that he liveth in the Parish of D. out of the peculiar: The Defendant said, that that Parish was within the peculiar, and thereon, as if Bounds of Parish were in debate, would have had Prohibition; Sed curia contrà, Peculiars being by Spiritual Composition by Bull, &c. And this Court will not try Bounds of peculiar as they will of Parish.

Dickinson *against* Prestwich.

(79) Executions. PAulet prayed, the Defendant going abroad by Rule, might be brought into Court by Rule to be charged with Actions, in regard the Opinion of the Court is, that in such charges the Plaintiff must prove the Defendant actually in custody, and not only by Committitur entred on the Roll; which the Court granted, or that the Marshall shew the Prisoner to the Plaintiff.

Dudly *against* Cole. Ante.

(80) Arbitrement. THe General Releases being not to be given till after the Gown made, and that only conditional, and left to the Taylors discretion, the award is void.

Judgment for the Plaintiff.

Justices

Justices of Leicestershire.

Wingfield prayed Confirmation of a Sessions Order, that new Barton in the Hundred of Perkno, be charged to the Poor of Loughborough, which was opposed, in that the place tared was no Parish, and so not tarable, as the Isle of Foulness, without Special Proviso. Also by Keeling, the parties may go Originally to Sessions, as in Case of Garrowdon Parke was resolved; to tax any place for this, in ease of the two Justices, and the party is not hereby barred of his Appeal, but it may be to the next Sessions; contrà where any thing is to be done by the two next Justices that cannot be Originally begun at Sessions. Hyde contrà, that the next Sessions in this Case will not be equal Judges; and for this Cause, the Justices that make Order for Bastard, have no votes in Sessions; Twisden absente. (81) Poor.

Adjornatur.

Hales *against* Jull.

Tuesday, June 28.

Mr. Attorny prayed an Allowance of Plea, that the Lands in the Ejectment were within the five Ports, which the Court granted, there being no Imparlance, General or Special, both which affirm the Jurisdiction of the Court; but had the demise been laid out of them of Lands therein, such Plea would have been disallowed, by Twisden; and at the Venire facias the Plaintiff may Suggest the Lands to be within the five Ports, and have it of the places adjacent within the County. (82) Ejectment.

Hale *against* Atherton, &c. Manucaptors of Weeks. Ante.

Polyxphen prayed the Opinion of the Court, Whether Recognizance of Bail be well removed by Writ of Error of Judgment against Weeks the Principal, as also in adjudicatione of Execution against the Bail brought by the Bail. Twisden conceived this Record well removed hither, as 1 Cr. 575. Smith *against* James, as the latter Opinions, although the contrary be held, Hub. 72. Forests Case: So when the Principal brings Error of his Judgment, and adjudication of Execution 24 Car. Scot *against* Jeoffries, against the Bail, and Steward below cannot determine whether the Bail may have (83) Bail.

Error

Error of principal Judgment, or not: So where Principal and Bail joyn: But by Keeling, in both these Cases there were Judgment against them that brought the Writ of Error; and although in Sir William Brunkards Case it was ruled in the Exchequer Chamber, that the Purchaser for his privity of Estate may have a Writ of Error; yet here there is no Judgment against the Bail, and therefore the Record is not removed in Scire facias against the Bail, and Nul tiel Record pleaded here by them Windham agreed an Estranger by fraud cannot remove Record, but any that is endamnaged, or pretends to be so, doth remove the Record, as 3 Cr. by Writ of Error, although Error doth not lye for such person. Twisden agreed in Writ of Error by the Bail there must be Judgment; contrà in Scire facias against them brought on Recognisance, Adjornatur.

The King *against* Luxford, &c.

Wednesday, June 29.

(84) Lowce. The Court quasht an Indictment of Forcible Entry and Assault, it being quod ad tunc & ibidem assemblati ingressum fecerunt, & ipsum le Plaintiff verberaverunt, &c. not saying ad tunc & ibidem. And, Hyde and Windham absente, it was quasht on Bauds Case, 2 Cr. 41. the Offences being several, must have special times alledged, ex motione Lee.

Finie *against* Charleton. Ante, 759

(85) Pleading. Windham on Stephens's Case, Dyer 353. pl. 29. conceived that the hoc paratus est verificare is ill on general Demurrer to the Replication; contrà on general Performance pleaded, or any Justification, absque hoc, he that concludes the Negative never ponit se super patriam, but only he that ut prius affirms his former Covenant or Plea; which Keeling agreed; contrà by Twisden, although the course of the Clerks is to enter it thus, & hoc paratus est verific. yet its ill on such particular Plea. And the Court differing, the Plaintiff prayed leave to discontinue, which was granted. See Issues Joyn, Br. 1.

Jackson

Jackſon *againſt* Fenwick and Holt.

BErtue prayed the Depoſitions between Primate and the Defendants in Chancery of Witneſſes that are dead, might be allowed at the Aſſizes in an Information of Perjury, which the Court refuſed; either for that the Defendant, or the King, in regard the King is no party to the Suit in Chancery. (86) Proof.

NOta pro Regula, That on the laſt day of the Term the Court will never hear Motions for altering Venue, or ſtay any Proceedings after Judgment on Reference prayed to the Secondary; nor will alter any poſſeſſion, how illegally ſoever obtained; but mutata opinione they now frequently hear them for Reading a Record (not before in the Paper) to be made a Concilium of the following Term. (87) Days.

DE TERMINO Michaelis,

16 *Car.* II. *B. R.* Die Lunæ, Octob. 24. Anno 1664.

Hyde *Chief Justice.*
Twisden,
Windham,
Keeling.

The King *against* Selby, Briscoe, and four others.

THe Chief Justice had bound them over hither from the Sessions at Newgate, in that being Jurors, they contrary to clear Evidence, would not find certain Quakers Indicted there Guilty; They found they met under pretense of Religion, and that it was not according to the Laws of the Church, with Common Prayer, but because they were not satisfied they met only in pretense of tender Consciences, and to raise Rebellion, although the Court directed them, if they were satisfied they met, being twice before Convicted, they ought to find them Guilty; for if they were there to raise Rebellion, they are triable another way, as for Treason; also it lyeth on the Prisoners side to prove upon what account they were there: The Court ordered an Information against them. (1) Enquest.

(2) Force. THE Court (ex motione Jones for Restitution after Verdict and Trial had against his Client, and Restitution awarded to the Defendant on Indictment of Force on Issue, that the Lands were not Auncient Demean) conceived that if Steward there be illiterate, or partial, as if he were Solicitor of either party, that the Trial ought not to be in the Inferiour Court, but that it may be on feigned Issue in an Action of Trover at common Law for the profits; contrà in an Action of Trespass, and awarded Restitution Nisi the Defendant would accept such Trial. Ballard Attorny for the Plaintiff.

In Enfant, F. 6. Kebles Case.

Tuesday, Oct. 25.

(3) Recovery. MEmorandum that I went into C. B. as Tenant, to suffer a Recovery, wherein my Brother Richard Keble, and Elizabeth his Wife were Vouchées in person, and also Milton and Brooke, who were absent, and Tho. Keble demandant, and all the Vouchées not being present, the Court would not suffer it to proceed by parcels, but if part do now, all must appear again afterward the same Term to vouch over the common Vouchée, but they absent make an Attorny, and so it passed on Thursday, and Keble and his Wife appeared, and after the other two.

Vaughan *against* Sir Henry Andrews.

(4) Assurances. IN Ejectment it was agreed, per Curiam, that a Deed of Bargain and Sale given in Evidence is good between these parties, although no Consideration were pleaded but against Creditor or other Purchaser, not only a good Consideration must be shewed in the Deed, but payment also; and Drew the Lessor of the Plaintiff, having concealed an absolute Deed, which was so made by his Cosin, who had nothing else, was Nonsuited by the Defendant, who claimed as Heir in right of his Wife.

Bicker-

Bickerſtaff *againſt* Perdew.

Trin. 16 Car. 2. Rot. 984.

Wedneſday, Oct. 26.

IN Debt by Adminiſtrator cum teſtamento annexo; on Leaſe made by his Teſtator for Rent arrear after his death; on Non debet pleaded, and Verdict for the Plaintiff, Wild the Kings Serjeant moved in Arreſt of Judgment, becauſe its not ſhewed by the Plaintiff what Eſtate his Teſtator had, which, per Curiam, on demurrer, had been ill, eſpecially not ſaying the Teſtator was ſeized, but only quod cum demiſiſſet, &c. reverſione inde to himſelf, but after Verdict, which hath found quod debet, it ſhall now be ſo intended and that the Teſtator was a Termor, and not ſeized in Fee: But Hyde contrà; the Plaintiff can have no Action without ſufficient Title, and the finding that the Reverſion was to the Plaintiff by virtue of Adminiſtration, & quod debet, although they cannot be otherways true, is not ſufficient: But by Keeling, it had been good on demurrer; for Leſſor in debt for Rent never ſets forth his Title: But by Twiſden, &c. it's the better way to do ſo. (5) Monſtrance.

Adjornatur.

Ruſſel *againſt* Sucklin.

IN an Action upon the Caſe againſt the Defendant, as Sheriff, for Eſcape of one Roſe in Northfolk, and falſly returning Non eſt inventus into B. R. in Middleſex: After Verdict, Coleman, in Arreſt of Judgment, conceived this a miſtrial on the Stat. Jac. being to be intended where the cauſe of Action ariſeth from ſeveral places in the ſame County, not when from ſeveral Counties: Alſo the falſe Return is the principal, which Twiſden agreed; Sed Curia contrà, the Eſcape being the cauſe of Action, and the falſe Return, which is alſo made in Norfolk, is but aggravation, as 7 Co. Bulwers Caſe, alſo the party hath Election to lay his Action in either County, and the whole muſt be laid in either Declaration. (6) Eſcape. Dett, Fitz. 80.

Judgment for the Plaintiff, Niſi.

The King *against* Somers and Somers.

(7) Slander. THey were Indicted for a libellous Letter to Mr. Melwiches Mistress Harvy, That he was a debaucht person, and had no Estate, The parties were found Guilty and fined, one 100 l. the other 30 l. in London by the Justices of Peace. Winnington assigned for Error on removal of the Judgment, that the Justices have no power of this Offence, being originally punishable in the Star-Chamber, or here, being a thing rather of Government then Breach of the Peace. 2. The form of the Process is ill, the first Sessions being 13 Car. 2. when the Indictment was found, after which there was an award for the parties to plead, which they do at the next General Sessions, and no Continuance is made, which is necessary when any Entry is made quod postea, at another time the party appeared; contrà if it were ad hunc diem, then whenever the party cometh in, the Continuances may be entred up at any time. Also 3. there is a Continuance of the parties to the next Sessions, & idem dies to the other parties, which is ill, the Sessions being at no day certain, the Court conceived these two last immaterial, and the Continuance ad proxim. Sessionem is sufficient; and there is never any Continuance below after the Venire facias. Wild for the King, This Libel tends to Quarrels and Breach of the Peace, as Pictures or Hoops set up at Doors: The Court conceived this only a private defamation, and not infamous, and therefore not within their power; were the words of an Officer, unless they be against Execution of his Office, or of him in his Office. Windham conceived, that had the Defendant vaunted of his Letter, and published it, it possibly might have been Indictable: So where many persons are mentioned in a Libel, although the matter be particular; but here it was only particularly directed to one, which might have been good cause for the Judge, before whom it was tried, to direct for the Defendant; but here being found quod nequiter publicavit, &c. he doubted.

Stiles 244. pl. 558.

Adjornatur.

The

The King *against* Prin.

(8) Slander. Sider. 219. pl. 4.

Indictment at Exeter for causing a Libel against the City to be delivered to the Parson to publish, and quicken the Magistrates to punish the crying sins, &c. After Judgment there, Jones assigned for Error that this is not Indictable, because although it suppose great Wickedness, Uncleanness, and Sodomitry in the City, without controul of the Magistrate, yet it doth not suppose the Magistrate knew of it; also what became of the Letter doth not appear, and in the Judgment it self, Ideo consid. quod Def. solvet to the King 100 l. on his Confession, there is a fault. Windham and the Court conceived this a Scandal of the Magistrates, and this a sufficient publication, for it implyeth their default, in that he exhorts to quicken them; also quod solvet is well enough however, only the Judgment is reversible, but no more in case of the King. 2. The party not being present, the Court would hear no further Exception. Adjornatur,

Ride *against* Atwicke. Ante.

Tr. 13. Car. 2. Rot. 630.

Thursday, Oct. 27.

(9) Devise.

John seised in Fee, devised to his Wife for five years, and by Codicil adds, that if any of his three Sons dye before the five years be out of the Freehold, then to be equally divided between the Survivors (mentioning no Lands at all;) He and two of the Sons dye, the second, viz. D. leaving his Wife inseint with the Lessor of the Plaintiff, and on Tr. 1649. Rot. 394. Bell *against* Wainman, Stroud on Special Verdict conceived it void for incertainty, Stiles 240. pl. 557. Also this would leave the Children of that Son that dyeth, without Provision: Also the Codicil going in destruction of the Will, is to be taken strictly. 2. These words can only relate to that Freehold; which the Wife had for five years, because else the same advantage, as to the other Estates, remains afterward, and the Contingency of division is tied up to five years, and the Wives Estate is only Conditional, 10 Co. 43. Portingtons Case. And by this Construction all Legacies are satisfied, and Provision made for all. Also 3. This makes, as Lewin *against* Coxe, 3 Cr. 493. only Tenants in Common; also this would be unequal, being annexed

nered to Williams Estate only as Eldest, and so if he dye, his Estate shall Survive, but nothing, or only a Moiety of the other Estates shall Survive to him, because expressly devised to John, and Daniel, and their Heirs.

(2.) Baldwin for the Defendant Daniel, agreed only an Estate for Life to be in the Defendant, but so he shall have, being living, and the only Survivor at the end of the five years, and not on the death of either of the Sons within the five years: The five years is only for Limitation of the Contingency, not that it should be then presently divided on the death of one; in which case William dying first, if they be Tenants in Common, Johns Moiety discends, like the Case 3 Cr. 52. Pettywood *against* Cook. Also the not finding that William dyed without Issue, is ill, and primer possession (the Defendant, by Rule of Court, being made to confess Lease entry & ouster) is not sufficient: The Court conceived that had the words been, that on death of either the Survivors should have it equally to be divided, it had made them jointenants. Keeling conceived the words shall not relate to to the Estate of William, but only to the Freehold, which was devised to the Wife for five years, for the other is not mentioned in the Will at all; and this is repealed on this Contingent, if it were any ways good; but for the uncertainty the Codicil is clearly void. Also the Court will doubt of no more then the Jury doth, but will intend all other Titles. Windham conceive the meaning was, that the share of him that died should be divided, not any of the other Estates; and the Heir is provided for by the Inheritance; and by the death of any of the other their parts discends, which they had by Survivorship. Also its not said, the Issue of John entred as Heir, and therefore it shall not be intended William died without Issue; when the Jury doubted on single point, the Court will not intend any thing else: but when the conclusion is si super totam materiam, the matter is left at large, but the Court will not supply this by intendment, Castle *against* Hobs 2 Cr. which Twisden agreed; but conceived primer possession sufficient in the Plaintiff; So Hyde; and that the Codicil is uncertain and Derogatory, and so void.

Judgment for the Plaintiff. Nisi.

Conny

Siderf. 220. pl. 5. Conny *against* John Jacob. Ante.

THe Court conceived the Entry of Committitur alone is (10) sufficient Evidence to charge Sir John Lenthall, Marshal, Execution. as in Execution for Escape of a Prisoner, without actual proof of his being in Execution: But if he be so, although no Entry of Committitur be made in the Marshalls Book, he is chargeable: Also Committitur is but the Act of the Attorny, and so not sufficient to take Capias, or hinder other Execution to be taken against the parties.

Boarman *against* Arton Executor of Eltonhead.

IN Action of Covenant on Lease for years, that the Les- (11) sor, nor any of his Tenants, should not dig Gravel o- Covenant. ther then for Repairs, the Lessor having before made another Lease before of Kills, which Lessee leaseth over part of his Term, and if the Sublessee may be said Tenant to the Lessor, they find by Special Verdict for the Plaintiff, if not for the Defendant. Barwell for the Defendant, That the Lessee hath but a liberty to dig (on demise of the two Wharfs) in the Gravelpits, which were in the hands of other Tenants and the Under-Lessees are possessed of the Kills, which have also liberty to dig; and are most properly Tenants to the Mesne Lessee, and not to the Lord Paramount, or Lessor. Also the meaning shall not be extended against a Stranger, as the Under-Lessee is, and on whom the Lessor, as Yelverton 36. hath no Tye, the Case of Condition and Covenant differ not as to this purpose. 2. It is here intended of Under-Tenants of the Soil, in which the Covenantee hath liberty to digg; for Tenants of other Lands would be Trespassers by digging, and so cannot be intended to be restrained by Covenant. Keeling conceived the Case strong, that these are Under-Tenants within the Covenant, which might intend other Tenants then those of Soil, which the Court agreed; and by Hyde, If Seignior (where Freeholders and Copiholders) seised of Chalkpit leaseth it with such Covenant against his Tenants and Under-Tenants, if Lessee of Copiholder dig, the Covenant is broken. Adjornatur.

Dolewright

(12) Slander.

Dolewright *against* Barwel.

YOu P. go lye with a Cow again; if you had your deserts, you would be hanged. Winnington in Arrest of Judgment, that no mention being made of Buggery, the words are not Actionable. See Judgment for the Plaintiff.

Lord Fauconbridge *against* Dean and Chapter of York. Ante. Friday, Oct. 28.

(13) Prohibition.

JOnes prayed Prohibition, Suggesting that one of the Prebends, who as such, was Treasurer of the Church, and by vertue thereof proved Wills, and made Inductions, &c. the Prebend Surrenders his Corps to the King, cum pertinentijs & Commoditatibus (but not privilegijs) and the King with larger words regrants to the Plaintiff, which is confirmed by private Act of Parliament; and this being Spiritual, although some Branches be lay, a lay person is not capable of it, by Keeling, nor can the King Exercise such Jurisdiction, but only grant it over, which Hyde agreed, but Windham and Twisden doubted. Adjornatur.

Roch *against* Cotterell.

(14) Error.

WInnington prayed amendment of Judgment after Verdict in Indebitatus, being Capiatur for Misericordia, which was refused per totam Curiam, on Ellisons Case, and Twisden said Keyes's Case was amended, because the Secondary Broom, or Hodsden, who entred his Judgments himself, had done it right, but his Clerk mistook his directions, and entred Misericordia for Capiatur; but this is aided by 16 & 17 Car. 2. cap. 8.

Palfry *against* Plees.

(15) Covenant. Siderf. 270. pl. 25.

SIderfin moved in Arrest of Judgment in an Action of Covenant, grounded on Articles, whereby the Plaintiff agreed with the Defendant to give so much per Load for all the Bark of such a Wood, and that the Defendant scribi curaret a Bond (not saying of what Sum, or to whom) and the Breach is assigned in not writing the Bond, nor being ready to deliver it on 5 Co. 77. Saimans Case, because no Sum is mentioned, and the matter incertain, the Agreement is void, as Bibbe *against* Cunningham, Hetley 89. Sed per Curiam, the Defendant ought to have given a Bond, and the Sum may

may be reduced to certainty, according to the value of the Book, and should not have pleaded Non Assumpsit.

Judgment for the Plaintiff.

The King *against* Philingham.

Saturday, Octob. 29.

ON Mandamus to restore a Burgess in Nottingham, Bigland excepted to the Return, which was for not taking the Oath and Declaration in the Act of Corporations, 13 Car. 2. cap. because a Burgess is none mentioned, nor within the meaning of the Act, being no ways interessed in the Government, Sed non allocatur, because they are part of the Common Council in the Return, and have a voice to elect Parliament men, &c. they affirmed the Return. (16) Mandamus.

The King *against* Cooper.

THe Court, as in Mr. Prin's Case, conceived that it's a sufficient Return by the Mayor, to say, That H. was turned out by the Commissioners in the Act of Corporation, they having no power to know the cause why the Commissioners turned any out: But by Twisden, had the Return been by the Commissioners, there ought to have been a Summons. And Hyde Chief Justice doubted whether one turned out by the Commissioners may be in futuro Elect by the Mayor, &c. into any other vacant place. (17) Corporation.

Tooke *against* Atho.

COleman moved in Arrest of Judgment in Ejectment laid on Demise at Tavenham of a Land and House in quodam Campo juxta le Castle Hill, which, per Curiam, is ill, and no Execution can ever be directed to any Sheriff, but in debt it's well enough, as Cr. that any place be of the Demise; but in the other it must appear where the Land demised lieth. Adjornatur. (18) Lieu.

Grove *against* Nevill.

Pasch. 16 Car. 2. Rot. 401.

(19) Enfant. IN an Action upon the Case in nature of deceit on Sale by the Defendant of Goods as his own, whereas in truth they were anothers. The Defendant pleads Nonage at the time of the Sale: To which the Plaintiff demurred: And by Croke, this being a tort as Waste or Escape, Nonage is no Plea; Sed Curia contrà, this being no actual tort, or any thing ex delicto, but only ex contractu, which is voidable by Plea; but it's a tort by construction of Law; Windham doubted. Adjornatur.

Opie *against* Thomatius.

(20) Powers. BY Special Verdict it was found in Ejectment that Rouse Tenant in Tail, made a Lease for 99 years determinable on three Lives, and then after makes another Lease to commence after the former Lease, then Tenant in Tail dyeth, and his Issue conveyeth by Fine to the Plaintiff: And Polyxphen argued that against him this Lease is not good, because its to the prejudice of the Issue in Tayl, as Rent granted by him is void against the Issue, unless it be for release of right of the Tail, 10 Co. Octavian Lumbards Case. So Lease without Rent is void by his death, Pl. Com. 437. 26 H. 8. 2. as of Baron seized Jure Uxoris: Also this is but a present Charge and Incumbrance in futuro, and no present Lease, but is a clog to the Conveyance of the Reversion, and so an apparent prejudice, being not voidable by Entry or Claim, nor 1 Inst. 296. capable of Confirmation, Release, or Surrender, 1 Co. 137. An. Mayos Case, and therefore void: Also Entry of Lessee is not justifiable, as it is if only voidable: Also Issue in Tail is quasi remitted as to the avoiding the Charges of his Auncestor, because here is no person against whom he may have remedy, Dyer 297. Pl. Com. Smith *against* Strapleton. 2. Maynard for the Defendant, absente Twisden, held the difference, that of any things that issue out of the Land, or of the Land it self, Leases are only voidable, but other Collateral Charges are absolutely void, which Windham agreed; and that a Lease without Rent may be affirmed by acceptance of Fealty: Also the Tenant in Fee claims under the Lessor by Fine, and so must take the Clog; and had the Auncestor, Tenant in Tail, levied the Fine, it's clear, but because the Issue might

2 Bulstr. 206. pl. 140.

might have avoided the Lease, his Comisee hath the same Election if the Lease be only voidable, which the Court agreed. Maynard now shewed that the Power reserved to make any Lease determinable on one or on two Lives, doth warrant the Lease in question, the Land at the time of this Reservation being in Lease for three Lives: And in the Chancery in Case, there was good Opinion, that power to make Leases in possession, warrants a Lease made by H. in Reversion during Joynture, 38 Eliz. Thomson *against* Traford on 13 & 18 Eliz. However 2. this Lease is warranted by the Interest of the Issue in Tail, there being a Rent reserved, contrà of a Parson, his Lease is void by death, as 33 H. 8. Dyer 51. b. and the Comisee cometh into another Estate, then that of the Issue in Tail, as Procter *against* Kelsey, Bridgman 27. and so hath no Election, any more then on 11 H. 7. to avoid Lease by Joyntres. Windham conceived this power doth warrant the Lease made determinable on the fourth Life, Leases in possession being as well intended of the Reversion as of the Land in possession, Dyer 357. but not in Reversion. Hyde conceived the Election destroyed by the Fine, as well as Revocation: And by Windham it's a point of great consequence, 7 Co. Earl of Bedfords Case. Adjornatur.

1 Roll. 403. 1 Brant. 77. 1 Inst. 46. b. Godbolt 9. pl. 12. 21 Jac. 29. §. 3. 13 Car. 2. Stat. 2. cap. 4. §. 3.

2 Leonard. 188. pl. 236.

Butler *against* Mayors.

NO Trial by Proviso, notwithstanding default of the Plaintiff, can be by Nisi prius, without giving Rules of eight days notice in the Office of the Secondaries, which the Court agreed. (21) Trials. 14 Ed. 3. 16. § 1. N. 11. Hetly 81. 116.

Ratcliff *against* Tate.

NOta pro Regula, That after Hab. fa. possessionem executed, be it by Sheriff, or voluntary delivery of possession, if the party be turned out again by the Defendants means, he may have a new Hab. fa. possessionem on motion in Court, and Attachment against him: But if after quiet possession others enter, he must have new Action or Restitution, else by this means by practice the Plaintiff may turn out any of his after Lessees on Non-payment of Rent. (22) Execution.

Alderman Lawrence Sworn Lord Mayor.

Monday, Oct. 31.

(23) Records. NOta, The Court directed Coleman, now admitted Clerk of the rules that he should not enter the Reasons of any Rule, but only Ordinatum est, &c. nor deliver Copies to any Counsel or Attornies to agree; but if any doubt be, to stay a day or two, or go with Counsel to a Judges Chamber; or move the Court to declare their meaning.

Snow Lessee of Dr. Crawly *against* Philips.

(24) Proof. Sider. 220. pl. 8. NEwdigate excepted against a Bill in Chancery exhibited in Evidence against the Defendant, whereby he prayed to be received against Simoniacal Agreement, because Counsel or Solicitor may draw it in absence of the party; Sed curia contrà, There being a Suit in Chancery proved, and no other appeared, its good Evidence, although not binding. And 2. Procurement is Symony, although by a Stranger, ex parte recipientis, but the Patron shall not lose his presentation, unless he have notice, as 1 Cr. Mackallyes Case. The Counsel of the Defendant, 3. admit him Simoniacal, yet on 12 Car. 2. cap. conceived him confirmed by the Act of Ministers, being in Actual possession 24 Dec. the general words being, not only relating to the preamble, of defects in the late times, but also, notwithstanding any Act done or omitted by the Incumbent, especially the Act of Oblivion having before Pardoned the Offence; and however, as Latch. 22. and Burtons Case 6 Co. there being no due Presentation, as is requisite in 31 Eliz. 6. for want of Bishop; as one Convicted of Perjury, and after Pardoned by the Act of Parliament, is now capable of giving Evidence. This very point, by Glyn, Counsel for the Plaintiff, was per totam Curiam, resolved the Act of Oblivion doth no ways restore or capacitate the party, in a Prohibition prayed in C. B. by this Defendant; nor is this disability of Simony cured by the Act for Ministers, for, notwithstanding any other Act done or omitted, was added to help the not reading the Articles, Institution, and other Collateral Act's: And those Objections were overruled also in C. B. which Hyde remembred when he was there a Judge: Also Perjury is inseparable from the Crime; contrà in the Case of Smith 41 Eliz. Owen 87. of

Si-

Simony, that is distinct from the crime, and it being a Nullity, the Incumbent cannot be said in possession, which the Court agreed clearly, but when a Special Verdict is demanded by a Serjeant, the Court cannot deny it, by Hyde, as was resolved in C. B. in the Case of Popham *against* Southcot, where the case was of a Wreck as clear as the Sun; yet because Serjeant Glanvill prayed it, and stood on it, it was granted: Also by Windham strongly, that Burtons Case is no Law, 6 Co. 13. b. its doubtful if presentation obtained by Simony, and nothing done thereon farther, make the living void. But I conceive it will so on Admission by the Tryers, 9 Car. Priests Case in the Exchequer Chamber; The Act of general Pardon lets not in a Pluralist, but only 1 Cr. 354. Pardons reatum, much less of Simoniack. Also three of the Judges of this Court, as Delegates have Judicially given their Opinion already; and so this is an extraordinary Case not within the Common Rule, nor no new Case. And by Hyde, in Fowlers Case in this Court Symoniacus was adjudged, that he is not capable of this, or any other Ecclesiastick Promotion, as by the Canon Law, of which this Court will take notice; but per Curiam, though this be cause of refusal, yet by 31 Eliz. it makes him only uncapable as to the same Living. The Court conceived the matter clear, and were most unwilling to suffer Special Verdict, but denied it: And the Council for the Defendant seeing the Opinion of the Court direct, waived it. Judgment for the Plaintiff on General Verdict.

Siderf. 123. pl. 11. Wright *against* Beal.

STroud in Arrest of Judgment in Indebitatus Assumpsit by cumque etiam, in Action on the Act 12 Car. 2. cap. for the Confirmation of Ministers for the Moiety of profits, for which, by the Act, the party is to give Bond. After Verdict for the Plaintiff, by Keeling, this is but for security, and the duty remains, and Non Assumpsit generally pleaded is only to the cumque etiam, but not guilty had been to both; so here is discontinuance of part, which is aided: Also the Indebitatus is intended on contract at Common Law, although it be for Tithes of the same year, there being no conclusion contrà formam Statuti: But by Winnington for the Defendant, Indebitatus lieth not for Tithes without setting forth the contract particularly, Hulls *against* Brayfield: But by Jones for the Plaintiff, unless there were a contract he could not be indebted for Tithes, and so its as good as for Wares sold, (25) Encumbent.

sold, without relating the cause at large: Windham held Indebitatus for Rent on Lease for a year, or profits of Rectory, lieth not, being in the Realty; and so of Tithes, for they are not in being, and so are not sold; also by Twisden, the Tithes are said provenient. è Vicaria, to which the Plaintiff makes no Title; but after Verdict, this shall be intended, as it may be good, that these are Profits of the Vicarige, and not paid by him. Adjornatur. 783. pl. 24.

Siderf. 222. pl. 10. The King *against* Sharpe.

(26) Bastardy. HOlt excepted to an Order for Bastard Child, being made by two Justices, not saying one to be of the Quorum, Sed non Allocatur. 2. Its said to pay 2 s. 6 d. per week till the Child be fourteen years of Age, which is void, and ought to be so long as the Child is chargeable to the Parish, which Twisden agreed: Sed, by Keeling, its in discretion of the Justices, as Hazelwoods Case in B. R. to order all the charges of the lying in, which Windham agreed: And that Justices may charge them, as well with Monthly, as Weekly payments: Also the party is discharged by the Death of the Child; and if the Child be never chargeable to the Parish, the Justices have nothing to do with it: But when once the Parish is charged, they may make such Order, and it ceaseth by other provision made for the Child, as by discent of an Estate, &c. this was the Case of the Parish of Edgcot, in Com. Bucks.

Jerny and Ramsey *against* Symson.

Thursday, No. 3.

(27) Trials. MR. Attorny moved for Trial at Bar this Term in faigned Action upon the Case, on Wager by Agreement of parties (as was used since 1640. only by direction of Chancery) to have the Opinion of the Court of the Validity of a Will of Lands in Derbishire; and although the Action were laid in Middlesex, yet being an Innovation, and the way to subvert Ejectione Firme's, which hath subverted the Formedon; and it sufficiently appears feigned on the Record in that the Title of Land is hereby to be tried in personal Action: Had it been by direction from the Chancery, the Court enclined to have it; but in no ways would grant this: nor, by Hyde, should either be granted, for this, as Examination of witnesses

ness going beyond Sea, before the Trial, would turn the Courts of Law into Chancery.

Robinson *against* Sayars.

IN Trespass for breaking his House, and certain Goods (not saying sua) nor then and there being, taking away; after Verdict, this was moved by Foster in Arrest of Judgment: Twisden doubted, because ad tunc & ibidem existens refers to the place of Visne only, not to the Goods. (28) Trespass.

Adjornatur.

Siderf. 223. pl. 12. Laughorn *against* Merry.

Friday, No. 4.

SIr Thomas Merry, in consideration of Affection, Covenanted to stand seised to the use of himself for Life; Remainder to his Wife for Life, Remainder to Ralph, Father of Ralph, the Lessor of the Plaintiff, and his Wife in Tail, who was Daughter to Sir Thomas Merry, the Remainder to his own right Heirs, and after dyed, a Fine was by Ralph the Son, and he suffered a Recovery also; but this being of less Lands then were in the Declaration, Maynard for the Defendant conceived, an Election ought to be made by the Tenant to the Præcipe, Sed non Allocatur: But the Court directed the Jury to find for the Plaintiff, for so much as is in the Fine. (29) Assurances.

Wright *against* Beal. Ante. 781. pl. 25.

WIld prayed Judgment for the Plaintiff, it being said for the Tyths è Vicaria provenient. of a former year, shall be intended for Tythes severed, which Twisden agreed; as pro una Acra ligni, which the Court agreed, being after Verdict, Judgment for the Plaintiff. Nisi. (30) Tyths.

Jammot

Siderf. 223. pl. 13. Jammot *against* Cooly.

Trin. 16 Car. 2. Rot. 481.

(31) Rents. IN Evidence to a Jury in Ejectment, the Title of Lessor was under Sir Ralph Bovy, as Grantee of Drake, of Rent-charge, with a Proviso that if it be behind, the Grantee, his Heirs and Assigns, may Enter and Retain until he be satisfied inde. The demand made was only, I come to demand, which the Court conceived sufficient, this being but by way of Distress, and not Penalty of Forfeiture, but after an express demand was proved. And now Maynard for the Defendant insisted, that this Title is not sufficient, for the Lessor of the Plaintiff to have Ejectment, for no Execution of the Grant quoad the Land appears, and so not like 1 Inst. 203. nor to Havergill *against* Hare, 2 Cr. 511. where by Use there was a Freehold executed, which is reduced by a Condition to Fee conditional, which Keeling accorded; and Twisden held by devise or act in Law, such Estate may be good, but not by act of the party. But by Glyn for the Plaintiff, there is no difference; for he that enters on Feoffments, doth not reduce the ancient Estate, but a new Interest: And in the Countess of Pembrokes Case on such Use limited on Fine, claimed to Enter and Retain for Fine due by Tenant right, and ruled in C. B. she might have Ejectment, which the Court agreed; but the Cases are not alike. Hyde and Windham doubted, and directed to be found Specially.

Stanton & Uxor *against* Hubbard.

(32) Trespass. Siderf. 224. pl. 14. IN an Action of Assault and Battery of the Wife necnon tearing of her Waistcoat ad damnum ipsorum, which by Coleman, in Arrest of Judgment, is ill, the Cloaths being the Husbands, which the Court agreed, and that several Actions ought to have been, præter Windham, who conceived this but a Consequent of the Battery, and not like Trover, which ought to be only ad damnum ipsius, or ad usum ipsius. Also were this only for taking the Waistcoat, it ought to have been ad damnum ipsius. Adjornatur.

Loveless

Loveleſs Executor of Chapman *againſt* Ratcliff. Ante.

HAd actual poſſeſſion been had by Agreement of parties, or by delivery of the Sheriff, the party can never after have any new Hab. fa. poſſeſſionem; but if there be Agreement to deliver poſſeſſion in futuro, if it be denied, a new Writ may be had: But per Curiam, after the year there muſt be a motion for it in Court. And by Hyde, if the Defendant hath paid any Rent to the Plaintiff after the Execution, he ſhall render all the Coſts. (33) Execution.

Harris *againſt* Fielding.

Monday, Nov. 7.

H. Seiſed in Fee makes a Leaſe to S. for his own Life, and the Lives of A. and B. S. leaſeth for 60 years to begin after the death of S. if A. lived ſo long, and after made another to B. for ſixty years, to begin after the death of S. and A. if B. ſo long lived: S. the Tenant died, and Serjeant Heal, under whoſe ſecond Son the Defendant claimed, purchaſing the Fee, after Aſſignment of the Leaſe levied a Fine, and ſuffered a Recovery before, which A. and B. aſſigned to Sir Symon Clerk Leſſor of the Plaintiff, who after purchaſed the Fee from the third Son, having Livery upon the Aſſignment; and if theſe Occupants were ſufficient Tenants in poſſeſſion to vacat the Fine and Recovery for want of Tenant to the Præcipe was doubted in Evidence to the Jury in Ejectment, and a Verdict and Nonſuit on full Evidence on the ſame point for the Plaintiff: And the Defendant waived it, and gave Evidence of Surrender (as is uſual in the Weſt Country, where there are many Leaſes for Lives) to be done under Condition, That if 10000 l. or a far greater Sum then the Lands are worth be not paid, the Surrender to be void; and ſo no payment being made, the Tenant continually keeps his poſſeſſion, and yet the Recovery good; but this muſt be by deed, not by parol. (34) Leaſes.

Burgoin *against* Thomas and Hardman.

Wednesday, Nov. 9.

(35) Ejectment. IN Ejectment against two, one Confesses, the other pleaded Not Guilty, and at Trial the Plaintiff is Nonsuited, he cannot take Execution against him that confesses; but if by Rule of Court one be made Defendant for part, and confess, the Plaintiff notwithstanding the Nonsuit, may take Judgment against him that confessed for his part; but if each Defendant take on him the whole Title, the Plaintiff in any Case cannot have Execution; but one Defendant being Lessor of the House, reserving a Chamber, who never had any notice of the Action, and therefore Judgment entred of the whole House is not void, quoad the Chamber only, but wholly. And Hyde would have had the Attorny that entred Judgment pay Costs, but ordered possession to be delivered to the Tenant on Agreement to relinquish the Costs.

Siderf. 224. pl. 16. Lichford *against* Eliot.

(36) Tresp. IN Tresp. for breaking a Close, and throwing 20 Logs upon his Ground diversis diebus continuando a quarter of a year also breaking his Cellar, and throwing down water. Powis moved in Arrest of Judgment on 20 H. 7. 3. pl. 7. §. 2. & 2 R. 3. 15. in that this being single acts, the continuando is void, as breaking Close, which the Court agreed, there being a certain number of Logs mentioned before, but else it would be well enough after Verdict; and so by Windham it is now, for tranf. may as well be transgressiones, as well as transgressionem, but being prædict. it must refer only to the throwing of the 20 Logs, which is void.

Tresp. Br. 441.

Green *against* Colduck and Corselles.

(37) Prohibition. ON Libel against Colduck for Sale of a Ship super altum Mare. Sawyer prayed a Prohibition for Corselles, who was drawn in by Process, which is prayed against all parties interested, suggesting the Contract made on the Land, which the Court agreed without Plea, præter Hyde, who conceived it ought to be pleaded, although it go to the original Suit, and not only to incident. Keeling absente.

.....*against*

..... *againſt* Kelly.

HYde remembred the Original of changing the Venue, which was not ſo at Common Law, being contrary to the Oath of an Attorny, which the Court agreed, and is in diſcretion, and may be diſpenſed with, as in this Caſe, on Affidavit that the Witneſs now in Town, living in Wales, could not be had at the Aſſizes: But Hyde refuſed to examin him by conſent of parties, as is uſed in C. B. (38) Viſne.

Buckenham. Ante.

HE delivered in his Pardon, which recited the Verdict and Judgment, neither of which were extant, and therefore they fined Sir Thomas Fanſhaw 20 l. and the Marſhal 100 l. for letting him go abroad. Alſo the Indictment being quod verberavit, which was omitted in the Pardon, and only vulneravit inſerted, the Court bailed him, but would not allow the Pardon. (39) Pardon. Coron. Eitz. 282. (280.)

Siderf. 225. pl. 17. Baſſet *againſt* Shippon.

IN Treſpaſs for entring his Houſe, & pedibus ambulando, continuando for two years, & alia enormia, under which he gave Evidence that the Defendant came as Suitor to his Daughter, and defiled her, which was the cauſe of great damages given, for which cauſe Winnington prayed new Trial, which the Court denied; but conceived this may well be given in Evidence, without saying quod inſultum fecit ſuper filiam, &c. ſo of the wife, but this is the better way. Judgment for the Plaintiff. (40) Treſpaſs. 2 Cr. 534. pl. 18 Error, Br. 90.

In Error, Br. 68.

EX motione Brewer to quaſh a Writ of Error brought on the Crown ſide, de Recordo quod coram vobis on Judgment given in B. R. the Court conceived that it well lay, as well on Errors in Law as in Fact, but on the Plea ſide only in Fact, and the other is removed into the Houſe of Lords, but never on the Crown ſide. Sed Adjornatur to ſearch Preſidents. (41) Error.

The King *against* Summers. Ante.

Thursday, No. 10.

(42) Slander. HE was Indicted at Sessions in Guildhall before the Justices, for a Libel against Mellish: After Verdict, and Judgment, Jones insisted on it for Error, that the matter is not indictable, being a private Scandal, for which the party may have an Action, 5 Co. 125. is of Pictures or Rhimes, for which no Action lieth; and had the words of this writing been spoken, its clear he could not be Indicted, and yet here is as much publication and notoriety, Hub. 121. as in Dacres Case is, that Slander by Letters scattered is punishable in the Star-Chamber, but contrà of writing of one Letter only. 2. The Justices have no power, supposing this matter Indictable, for there is no Statute in this case, and not any word in their Commissions, which giveth it them, only direct Breaches of Peace, not the Precedents and Consequences thereof: But in the Commission of Oyer and Terminer hath larger words, All Falsities, which may comprehend this; and all the Libels instanced in the 3 Inst. 174. are on Indictments in B. R. Williams for the King, contrà, That whatever tends to Breach of Peace is inquirable by them. Twisden doubted at first on Hub. Sir Bapt. Hicks Case and another Anonimus of the same resolution, that the Star-Chamber might punish such, because it tends to Breach of Peace. Justices came in lieu of Conservators, who at first could only enquire, but now may try Trespasses; and else there would be no remedy. Windham conceived no answer given to the second Resolution, de libellis famosis, 5 Co. 125. it being more defamatory to publish such words, then to make Pictures, or speak, because none knows from what hand this cometh; also its as much a Breach of the Peace, and wounds his Credit as much, as a Squib thrown in his face; at least, it hath a direct tendency to Breach of Peace, and so is punishable by them. Hyde Chief Justice contrà, remembred an Indictment against a Justice for worse words spoken of him in his Office, and the Judges would not give Judgment, it tends only to Breach, but are no more a Breach then Threats, for which only a Justice may bind to the Peace, but not Indict. Also in Stamps Case, he was bound to Good-behaviour, and here in Scire fa. on his Recognizance, It was held, that Threats were no Breach, also the party hath his particular Action: And its no Rule, that because it was punishable in the Star-Chamber,

ber, that therefore they are punishable by Justices of Peace, more then de scandalis Magnatum; also Evesdroppers are properly presentable in the Leet, as tending to Breach of Peace; yet an Indictment lieth not before Justices of Peace for it: And De verborum propalationibus, is not in their Commissions, as it is in the Oyer & Terminer. 2. The Letter appears not to be said of Mellish, but only that the person who is a Servant to you, that pretends to the Law, without any innuendo, which is not helpt by the Verdict. Keeling absente. Adjornatur.

The King *against* Harris.

(43) Trades.

JOnes moved to quash two Indictments on the Statute of 5 Eliz. 4. for using a Trade of Tallow-Chandler, because they conclude not contrà pacem, as all Indictments ought, quasht, per Curiam.

Sheers and Norlay *against* Martyn.

(44) Admiral.

POlyxphen prayed a Prohibition to the Vice-Admiral of Devon, on Nusance there presented below the first Bridges in the River of Exon, within the flux and reflux of the Sea; Suggesting this in corpore Comitatus, and so not punishable by the Admiralty, but Indictable at Common Law, and by particular proviso of 5 l. forfeiture in 34 H. 8. cap. 9. And this is a Trade in the Country, to bring Lime and Sand in Boats at High-Tyde, and the Kilns thereabout fetch it at Low-Tyde, in regard Boats at Low-Tyde Land it, and the River being bridd, and this necessary for the Country, its no Nusance; Sed curia contrà; Navigable Rivers are as High-Streets, which how broad soever can have nothing laid on them, 1 Eliz. cap. 17. & 5 Eliz. cap. 5. giveth other particular powers, but not of Nusances, and for this reason: And because it was in corpore Comitat. they gave day to shew cause why a Prohibition should not go, but would not grant a Prohibition (yet staid procedings) no more then for not boying an Anchor, or towing Boats in the Thames, which are as well punishable by the Admiral, as the Mayor of London, as Conservators. Adjornatur.

Heal

Heal *against* Atherton. Ante.

Pasch. 16. Car. 2. Rot. 52.

(45) Bail. WIndham on 1 Cr. 575. conceived the Record of the Judgment against the Principal well removed, as well as by Estranger; by Error assigned on Judgment against the Principal and Execution against the Bail: But there being no Judgment in the Scire facias against the Bail, they cannot have Error of the Principal Judgment alone, nor remove it; but if they joyn, its well removed. Also if it be Tam in redditione Judicij quam in adjudicatione Executionis, the principal Record is removed, quoad the Bail: But Scot *against* Jeoffryes, Hill. 23. Car. 1. not quoad the Principal: So Prats Case 1649. Also 2. There being no Judgment at all against the Bail, this Writ of Error is idle and void, and nothing removed more then on interlocutory Judgment, which Hyde agreed: But however it should be removed, the Bail cannot have any benefit of it. But by Wild the Kings Serjeant, hereby, by a Record of Inferior Court, the Lands of the Defendant, or of the Principal, would be liable all over England, which the Court agreed, and therefore by Covin it cannot be removed, nor by meer Estranger without Color; but by a Writ of Error this may be done: But against Rifams Case 118. Hutt. on Certiorari the Lands of the Defendant are liable only in Inferior Jurisdiction on removal hither, because the Court giveth no Judgment, but contrà in Debt here on such Judgment removed out of Inferior Court, or on Error.

Adjornatur.

In Arbitrement Br. 24. Bean *against* Newberry.

(46) Arbitrement. IN Debt on Obligation, Condition to perform an Award on Submission to two, ita quod they do it de & super præmissis by a time, or chuse an Umpire. They chuse an Umpire, who makes an Award of a General payment of 300 l. and not de & super præmissis, as the Arbitrators ought: Also where there is no restraint an Award may be by parcels, and the Breach being assigned in the Umpire, its ill, by Wild, who having demurred (was made to open the Concilium:) But by Jones for the Plaintiff, its well enough, being natural, to deliver up a Bill of Exchange to the Defendants Son, and Apprentice to the Plaintiff, and he to be discharged: Also the Submission is by the Defendant for her self, and

and her Son, and so whatever is done for the one, is done for the other. Windham conceived the Umpire only an Addition of time, and not of a distinct power, and therefore without any Ita quod he is the same as the Arbitrators, 5 H. 77. pl. 14. especially the words being that the Umpirage should be touching the premisses. Also although there be no (so as, &c.) herein, which Hyde agreed, But contrà by Twisden on Geffee *against* Brown, Hub. 190. But all agreed, that this being a Relation and privity in the Submission, the Award of the Bill of Exchange is mutual to her and her Son.

Adjornatur.

Coleman & Uxor *against* Harcote & Uxor.

Friday, No. 11.

IN Action upon the Case by Victualer, for saying of the Wife, She was a Baud of Bauds, and a Baud to her own Daughter, and special Damage laid ad Damnum, ipsorum 1 Cr. 419. Baker, which is well enough, by Symson for the Plaintiff, who after Verdict moved for Judgment, because the Wife was the cause of the Action, and so the Husband hath Election to joyn with his Wife, or not. Windham, The case of Case Mintern was real interest in the Wife; also after the Death of the Husband, the Wife solely could not have had this Action by the Survivor: Also by Hyde, the Action would not lye, for the words, without the special Damage, and the special Damage is only the Husbands; and although it be found, they both kept the House, yet she doth it only as Servant, the interest is only his. Twisden accorded, Keeling absente, Person 1 Cr. 329. so had the Damage been per quod he lost consortium of the Wife, they could not joyn, French *against* Lever in C. B. the case lately. Judgment Staid. (47) Slander.

Heliar *against* Calebrooke. Ante.

THe Court on reading the Record, being for Rent, conceived that an Assignment pleaded before any Rent due (on which the Plaintiff had demurred) was not a good Plea, the Action being against the Lessee himself, and so if against Executors, contrà if against Assignée. Adjornatur. (48) Administrators.

Came

Came *against* Gunston.

Tr. 16. Car. 2. Rot. 210.

(49) Assumpsit. Siderf. 225. pl. 19.

IN Assumpsit to pay for a years Board and Schooling of his Daughter, the Plaintiff brings the Action for three quarters of a year, which, by Stroud, in Arrest of Judgment, is ill, as Needler *against* Miller, Assumpsit to pay so much by Quire to a Clerk for writing, no Action lieth for half Quiers: So on Agreement per Cent. to which the Court inclined. Jones for the Plaintiff, the Contract is, if H. will put out his Daughter (not saying for a year, or any time certain) the Defendant will pay for a year, i. e. not for above a year, but for any time under. By Hyde, had the consideration been, if H. will place her Daughter for three years, the Defendant will pay, the placing must be aver'd for three years, but may be to several persons, which the Court agreed; for else had the placing been but for a day, the Defendant should pay for a year, and therefore the Averment ought to be of the placing according to the payment.

Adjornatur.

Wright *against* Beal. Ante.

(50) Assumpsit.

MR. Solicitor Finch moved to stay a Judgment on the Indebitatus, it being not said pro decimis habitis, or receptis, or that any Contract was for them. 2. In this latter part the Tyths are said provenient. è Vicaria, not Spectant. or pertinent. ad Vicariam, as the Plaintiff, who was Rector said in the former part of his Count. Windham conceived it well enough, as pro diversis mercimonijs, not saying venditis or habitis; Vicar may pay Tithes on the endowment: Hyde contrà; the Plaintiff must entitle himself, although he need not name the particulars: And the Plaintiff doth not appear to be Vicar, or to have power to sell. Twisden doubted de mercimonijs implieth sold, as well as party to whom; So pro acra ligni shall be intended Wood cut: All agreed, the former part of the Count being discontinued, is no inducement to lead, this being a distinct Count by a Cumque etiam, Hub. 5. Gardner *against* Bellingham, is de mercimonijs habitis, but indebitatus pro equo implieth a Sale.

Adjornatur.

Nota.

NOta per Curiam, ex motione Wild Kings Serjeant for new Trial; Huls and Cottington being Attornies, that after ne recipiatur entred, and Sessions omitted, he cannot try it without new notice, which must be convenient, and according to the Evidence, as on plene Administravit pleaded longer then ordinary, Issue Nil debet; but there need not eight days notice, unless it be out of Middlesex, or in another Term. (51) Trials.

Siderf. 206. pl. 20. Hill *against* Allen.

Saturday, No. 12.

IN Replevin where the Defendant avows Damage feasant in his Freehold, the Plaintiff replies by prescription for Common at certain time every year, as appurtenant to his Freehold in another place for four vacchis & dimidio unius vacchæ levant & couchant; After Verdict this was moved by Winnington in Arrest of Judgment, that it should be said for the half feeding of a Cow. By Windham, the avowry being but for one, its sufficient, whether it be good for the half Cow, or not, as Grislyes Case, which Twisden agreed; and that the prescription is good enough after Verdict, ceteris absentibus. 2. Its not said post falcationem grani, but generally from such a day, which may be well enough, and so shall be intended after Verdict. (52) Common.

Judgment for the Plaintiff.

Rogers *against* Rogers. Siderf. 226. pl. 21.

IN Debt against an Heir by Bill, which is alias prout patet of a former Term; after Riens per discent pleaded tempore exhibitionis billæ, the Defendant excepted at the Trial, because the Bill was not shewed, as is usual in C. B. and thereupon the Plaintiff was Nonsuit, and per Curiam the Bill is here confessed and need not be shewed, but contrà in Assumpsit or Count on any Judgment, so on plene Administravit pleaded the Plaintiff must prove the filing of the Bill, or Original, as is used in the Assizes in the West Coram Hales Chief Baron; but Rolls nor the Auncient Practicers by Windham and Twisden in their Circuits never used to shew it. (53) Heir.

(54) Execution. NOta, by Twisden, The occasion of so much liberty in the Marshalsea is, that the Marshall is not chargeable but by Bill, which must be Teste in Term time; and so in the former Term, the party is not escaped: And by the first day of the latter Term the Prisoner generally is to return to Prison, and so no remedy for the party.

Bevyne *against* Clapham.

(55) Days. Siderf. 228. pl. 24. IN Indebitatus laid at Bow in London the Defendant pleads the Stat. of Limit. The Plaintiff replies, that the Debt ariseth beyond Sea, and that within six years after return he prosecuted in Inferior Court in London within six years, which per Curiam, Hyde and Keeling absentib. is well enough, and no departure but a sufficient Prosecution, being removed hither on demurrer, by Williams for the Defendant. Adjornatur 799. pl. 66.

Siderf. 227. pl. 22. Palmer *against* Fleshier. Ante.

(56) Nusance. IN Action for stopping lights brought for continuance of former, special Verdict and Judgment given for the Plaintiff; per Curiam præter Keeling that H. that builds on Bl. Acre, and after sells Wh. Acre adjoyning, the Assignée clearly cannot stop the lights of the first House no more then the Assignor himself: Robins *against* Barns Hub. 131. and the Defendant having Demurred to the Declaration, Berry *against* Pope 3 Cr. because the Declaration sheweth no Title in the Defendant under Wheeler the former Assignor; but it appearing the Defendant had no Title till Wheeler, and so he must be intended he is Trespasser and had no Estate, unless the Defendant had traversed the Seisin of Wheeler, or else he is a disseisor; for the Plaintiff cannot know what Estate the Defendant hath. Judgment for the Plaintiff, as Sury *against* Pigot 1 Cr. Ayer being as light, a thing of necessity.

In

In the Exchequer Chamber.

JUdgment in C.B. Reverſed, Trover and an Aſſumpſit being joynd in the ſame Action, in regard they require ſeveral Pleas, and Aſſumpſit doth ſurvive, but not Trover; ſo Denton *againſt* Clerke and Flowerdew *againſt* Kellet. (57) Joinder.

Ellis *againſt* Creſwell.

IN Action upon the Caſe for words, the Judgment is after Verdict, that the Plaintiff recover Damages ac etiam de incremento, &c. per Curiam hic ſibi Adjudicatis, and doth not ſay ad requiſitionem ſuam, Judgment reverſt; But the Plaintiff praying time to look into the Record in B. R. by a Certiorari it was granted; and by Archer Judge in C. B. the Plaintiff hereby will try in the mean time to get the Record below amended. (58) Slander.

JOintenant grants Common to his Companion A. for his own proper Beaſts, Quære if good; and if A. may put in ſuch Beaſts whereof he is Joyntenant or Tenant in Common only with another. (59) Common.

NOta in B. R. by Twiſden and Windham, Not-guilty is a good Plea after Verdict in Aſſumpſit: ſo on non Aſſumpſit, the Jury may find the Defendant guilty, or not; and good, ex motione Williams in Arreſt. (60) Aſſumpſit.

Sherman *againſt* Cocke. Ante.

Monday, No. 14.

SYmſon moved that the Defendant who by Habeas Corpus had removed Ejectment out of the Sheriffs Court, might conſent to Rule of Court, that he ſhould confeſs Leaſe, Entry & ouſter, which the Court refuſed, the Defendant being not bound by the Rule below; becauſe they cannot proceed by way of delivering Declaration to the Tenants in poſſeſſion, but as at Common Law by actual Leaſe ſealed: And ſo by Hyde is the general Opinion of the C. B. but all the Trials below are tried in the Caſual Ejectors Name by him that is Tenant in poſſeſſion, to avoid charge But by Twiſden this (61) Ejectment.

is no innovation but suitable to the Rules at Common Law, and so just to make him confess here as the usual Rule.

Adjornatur.

Gennings and Raby *against* Robinson.

(62) Infant.

PLaintiff as Gouchee being Infant in recovery suffered by Raby to Robinson, the Tenant brings Error and Assigns Error, that he was an Infant at the time of the recovery, which was 1653. The Defendant replieth that in 1652. he levied a Fine sur conceſſit for 99 years to one Coleman, if he so long lived, to which the Plaintiff demurred; and by Stroud the only questions are, 1. If Infant at full age may assign his own Infancy to reverse a recovery suffered by him. 2. Admittant que cy, if this Fine sur conceſſit be a Bar the Court conceived if he appeared in person its Error in Fact, contrà of appearance by Guardian; but this being a common assurance, must be avoided during Nonage; Acts in pais by Infant may be avoided, as 8 Co. 42. at full age, so of Act of Record 10 H. 4. 5. by disclamer at full age, as on unequal Portion or Bargain and Sale, 2 Inst. 673. a Fine or Recognizance or Statute or Obligation Enrolled must be Reverst by Aud. Quer. during minority, because he of necessity must be in person at the doing of them, 9 Co. 80. Abbot de Strata Marcella: But Judgment against Infant in person, or by Attorny and Recovery, he may reverse at full age; which shall in this Case, as every days Experience, Daux *against* Paiton, be reverst by Error, and tried by Jury, he never being before Judicially inspected, 10 Co. 42. Portington's Case, Infant cannot suffer recovery by Guardian, it being rather a common conveyance then any real recovery by the Judgment; but 3 Cr. 471. Stapletons Case, 1 Cr. 307. Lord Newports Case, and Hub. Blunts Case. Infant was allowed by Guardian Poph. 130. Wescot *against* Cotton 39 Ed. 3. the Examination of Clerks ability after his Death may notwithstanding Art. Cleri. be tried by Jury to prevent failer of Justice, 33 H. 6 9. At the Grand Cape Infancy was tryed by Jury after full age, although before it should have been tryed by inspection, 3 Cr. 323. Hopton & Uxor on the same point reversed a common Recovery, and so is Stiles 246. Tr. 1694. Rot. 200. Aylet *against* Walker the same point adjudged although no Judgment be enter'd 2. The Fine sur conceſſit is no Plea in Bar, which the Court agreed clearly, being but for years; and the Plea doth not rely on the Estople, but demand Judgment if the Plaintiff may assign Errors: However by Windham it cannot be pleaded, the Infant being sufficient Tenant of the Freehold. 2. Jones

2. Jones for the Defendant waved the last point as made only to induce the former, but conceived he cannot reverse this Recovery: Aylets Case was of Recovery suffered by Attorny, which may be done at any time, that being an Act in pais and as void as Letter of Attorny; and this Error is no more then that there was no Warrant, which strikes not immediately at the Record, as this doth, where its suffered in person, that Judgment by Default, 1 Inst. 380. Dy. 104. cannot be avoided by him at full age, is clear, for the reverence due to Records, 9 Co. 30. b. the same ground is laid, Acts done by view of Judges, shall never be undone but by inspection of other Judges. So of Fine from which recovery, as here had in person, differs nothing. P. 6. H. 8. Rot. 22. Judgment by default in Formedon against Infant in B. R. was reversed by inspection; which is full proof that such Error of Infancy cannot be assigned at full age: Also there is as much concurrence of the Court to this Recovery, as to Statute or Recognizance: And there is no difference in the reason of the thing. Bargain and Sale is no Record nor nul tiel Record pleadable, its only a Deed enrolled for better Evidence, Mich. 40. Eliz. 377. Darcy *against* Jackson B. R. Error of a recovery against Feme Infant who appeared by Attorny, and judged on the former difference that it being by Attorny, she might reverse it; but contrà, if it had been in person. Twisden said Aylets Case was grounded only on question, whither Infant might suffer recovery; and the Case of Darcy was reversed, because the Feme could not make an Attorny: Bridgman 69. the Court inclined, that this recovery is reversible by Error, as Judgment by default, there being no inspection in Precipe as there is in Fine; but by Hyde Infant is no more inspected in Fine then recovery, but only a Feme; Also this is breve amicabile not adversarium; also on the Default after default, if the Grand Cape be retorn'd he cannot reverse it during Nonage; contrà by Windham clearly.

Adjornatur.

Bull *against* Mayo.

I have Indicted him of Perjury, and doubt not but to prove him guilty to all intents and purposes. Jones moved for Judgment, he agreed Hicks Case that the latter part is not Actionable, but the whole Sentence must be intended false after Verdict, and so its as good as an express Averment that he was never Indicted of Perjury, which Twisden agreed; and that the Defendant must Justifie if he can; and without special (63) Slander.

cial loſs Averment is nædleſs. Hyde and Windham contrà, falſò & malitioſe will not ſupply where the Averment is neceſſary, as here, for if he were Indicted, its not Actionable: ſo where its ſaid I was told or I dreamt, &c. the Plaintiff muſt aver, ubi revera he was never told ſo, whereever the words are not Scandal without Averment; but by conſent the parties agreed to amend the whole, or waive it, and begin de novo and diſcontinue by conſent. Judgment ſtaid by agreement.

Corbin *againſt* Mercin.

(64) Slander.

IN Action upon the Caſe for falſe Information within the Court of Exeter, per quod the Plaintiff was in danger to loſe by the Stat. 12 Car. 2. cap. 24. 100 l. and his Office of Cuſtomer and Surveyor in the Port of Exeter, not ſaying that the Office is infrà Juriſd. which Jones aſſigns for Error on the Caſe of Stain *againſt* Haddon; An Action upon the Caſe for words by an Attorny in Launceſton, which were not Actionable; but as they concernd his Office, and becauſe it did not appear he was an Attorny, Infrà Juriſd. Curiæ Judgment Reverſed, 1651. and in the Caſe of the Taylor of Bath the words were, he had ſtoln as much Cloath as would make his Wife a Waſtecote, and being Actionable of themſelves, the ſpecial Damage alledged in loſs of Cuſtomers in other places, is but aggravation and ſo well enough, which difference Twiſden affirmed; ſo here the Action being ſpecially grounded on the Statute for loſs of his Office. But by Hyde and Windham its the falſe Information that is the chief ground of this Action, of which by Cuſtom they have Conuſance, and to ſay ſuch a perſon took a Bribe is Actionable of it ſelf, and the loſs of the Office only an Aggravation: So Action for ſuch words ſpoken of a Juſtice of Peace infrà Juriſd. although he cannot maintain the Action without being a Juſtice, yet this being perſonal and not like loſs of Marriage in another place, the Action is maintainable. Adjornatur.

May

May *against* Gregory. Ante.

The Court conceived that the being a Barrester is only an inducement to alter the Visne, and not sufficient without other reason, especially in Trover and Conversion; but where it concerns him in point of Reputation, as an Assault, they will try it here: Siderfin moved it, and offered at a second Motion, because a Gentleman at the Bar, which the Court granted, perceiving he was of the same House. (65) Privilege.

Bevin *against* Chapham. Ante 794. pl. 55.

Tuesday, No. 15.

IN Action upon the Case on promise to pay so many Reyals; To part the Defendant pleaded non Assumpsit, as to the residue, the Statute of Limitations; The Plaintiff repleth, that at the time the Plaintiff and Defendant were in Spain, and that such a day he came over and entred plaint in the Sheriffs Court, which is of Record, and removed it hither by Habeas Corpus, and here declared, to which the Defendant demurred, because the Indebitatus is lain to arise in London; and in the Replication said it arose at Teneriff in warda prædict. Also where the Debt ariseth beyond Sea, and six years there pass, its not within the Statute, which the Court denyed: And by Windham at Teneriff in parochia prædict. shall be intended in London, and so no departure: Also a Cause begun below, and continued hither by Habeas Corpus, is a Suit within six years, although the Declaration here be after six years, which Hyde agreed, But Twisden doubted the saying H. was at Teneriff beyond Sea in warda prædict. is void, and repugnant in Plea; but I agree that for Visne it may be laid: But by Symson in Tayler *against* Raines the time or place was resolved last Term immaterial, and that the Plaintiff may pursue the Defendants Plea: Also the Defendant may travers, that Teneriff is not in warda predict. and the Defendant shall never by his Plea make that necessary and local, that is but form and Transitory: But by Windham however the old Books were; of late the Plaintiff may vary, as in Assumpsit laid twenty years, the Defendant cannot demur, but must plead non Assumpsit infra sex annos; and then the Plaintiff may shew cause of Action accrewing within four years. Judgment for the Plaintiff. Nisi. (66) Days.

Snow

Snow *against* Cutler. Ante.

(67) Estates. IN Ejectment Special Verdict find the Lands Copihold parcel of the Mannor of Hackney, devisable in Fee in Tail, or other ways, and that one Robert Jaacob by Surrender was seised of the Moiety in Fee, and devised to the Heirs of the Body of his Wife (who before the Surrender was Jointenant with the Husband for their Lives Remainder to his right Heirs.)

(1.) And Jones for the Plaintiff conceived it a good devise: 1. Copihold in discent and Limitation follow the Rules of the Common Law, and so no difference betwixt this Surrender and Devise at Common Law: Also the Wife having no Issue at the time of his Death, but only by another Husband afterward (named Cholmley) the devise cannot operate presently, as the Case of Foster *against* Ramsey, and therefore, if good, must be Executory, as a Fee devised to person in Esse after Fee conditional before, as Pell *against* Brown, and Fulmerston *against* Steward, and 10 Co. 35. it was never dobted but Devise may be in futuro without present Freehold; but if such Devise to person not in Esse at the time be good, hath not yet been resolved. I agree no Conveyance can be made to one that cannot take during Life of the Grantor, or not in Esse, Perkins 52, 53. but the reason of Conveyances which suppose Contracts precedent, differs much from devises, they suppose persons in Esse to Contract, but here the Law doth not suppose any knowledge or privity in the Devisee, and therefore such as Francis Case shall not forfeit till knowledge of Condition. So a man that cannot convey, may devise to his Wife, and yet its not because the Estate takes no effect till after his death, for so Estate might be limited in his Life; but because she cannot contract, the Limitations by way of use most resemble Dyer 298. pl. 30. these cases of Devise, and future use after Fee simple is good in them; so to person not in Esse, Dyer 340. a Feme que ferra she takes not by way of Remainder, but by immediate Limitation, as Joyntenant with her Husband. So a use to A. and his Heirs till J. S. hath a Son, and then to the Son in Fee, is good; nothing in the Case of Clerk *against* Corsmden Hub. opposeth this way, for there its only said that one cannot make his own Heirs purchasers, but nothing is said of the Heirs of Estrangers: Also a Devise to an Infant in ventre sa mere, contrà to Dyer 303. is good, and was so before the Statute 11 H. 6. 13. by Babington; and the words of the Statute to Devise to any one person

son or persons hinders no such devise, these words being put in to shew the power and largeness of the Statute: And therefore not restrained to persons in Esse, but rather to introduce the latter exception, other then to Bodies politick, Moor 177. pl. 312. Also our devise is at Common Law, and only a Limitation of the use on such Surrender, 8 Co. 96. cited in Mannings Case, Devise to his Wife, and after to his Children unprefer'd, is adjudged good of a Chattel to Daughter born after: And there is no difference of a Freehold as to the devise, both may be devised in futuro, P. 14 Car. 1. Cotton *against* Heath, on Reference to Jones. And Bartlet Termor devised to his Wife for eighteen years, after to his Eldest Son for Life, and after to the Eldest Issue of such Son that was then in esse, in Tail, and resolved good, and so certified by them. 2. Admitting the devise good, its not barred by a Common Recovery, being Copihold Lands, 4 Co. 23. it being a discontinuance only, which cannot be in our Case, it being in Remainder. Also here is Custom found to suffer Recovery, 23 H. 8. Rec. in value Br. 27. 3 Cr. 372. Tenant in Tail of Copihold suffered Recovery without Custom, and no Judgment given, Co. Entr. 206. whether such Recovery could be to Bar the Remainder. And in Cluns Case 3 Cr. 391. its expresly adjudged, that such Recovery Bars not, and therewith doth accord; 1 Cr. 45. for there can be no Recovery in value, which would make them rather Tenants by the Recovery, then by Copihold: Were the Recovery of Lands at Common Law, it could not be a Bar here, there being no recompence in value (not only in Execution, but) not so much as in intendment, which is the Hinge of all Cases of Common Recoveries, 3 Co. 60. and here the interest was not in esse, nor any part of the Estate passed by the Recovery; for which Cause in the first Age of Recoveries it was doubted, whither they Barred Remainders and Reversions, which because of the remedy by Formedon was after adjudged they should; also the Estates of Remainders or Reversions may be Split, but not so of Fees, the Recovery in value shall always be of absolute Fee, without regard to any Collateral Qualities, 2 Cr. 593. one may notwithstanding enter for Condition broken: Also he that hath only possibility of Entry for Condition broken, shall recover nothing, the Case of Pell *against* Brown adjudged in this point, that Common Recovery will not Bar future devise; and the inconveniences are on both sides alike, and salved by that, if the Contingent be remote, the devise is not allowable; but if the Commencement be in short or reasonable time, as determination on Life, &c. they are

good. Twisden, Admit this devise good to the right Heirs of Sarah the Wife, she hath but an Estate for Life, the Remainder in Fee; and if the Remainder be to enter, the Contingent is destroyed by the forfeiture, but contrà, if, as Jones urged, the Lord must enter. Windham conceived grant of Reversion to the right Heirs, is not good, no more then of Freehold: Also a present devise to an Infant in ventre sa mere, is void; contrà if it be said when he shall be born; so to J. S. when he shall marry my Daughter, this is Executory and good; so had our devise been to the Heir when he shall be born, had been good; but this being to the Heirs of the Wife, its intended present, and so void: Also if it were Executory devise its so confounded by recovery, that its gone. But Twisden with Windham agreed, if the Limitation were dependant on any other Estates, as Remainder to right Heirs of J. S. also devise to Infant in ventre sa mere, is good; and the Roll Warrants not the Case of Dyer 303. this devise was further to the Heirs of the Body of the Wife, if they attain the age of fourteen, Remainder over: Also by Hales Chief Baron and Windham, devise to Heir may be intended as well Heir apparent, there being no other, as real Heir; but the Case of Foster *against* Ramsey is express contrà: Tenant for Life: H. in Reversion deviseth the Reversion to J. S. when he shall Marry my Daughter, Tenant for Life dyeth, it shall discend till J. S. Marry her. Maynard for the Defendant being absent. Judgment for the Plaintiff, Nisi.

Came *against* Gunston. Ante.

(71) Apportionment.

Jones for the Plaintiff agreed the Case of an Attorny who was to give his Clerk so much per Quire, which is void, as to the od Sheets on intire Damages; but here the Averment need not be for a year, or any time, to which the Court inclined, there being a Verdict, and Damages only for the ½ of a year; and the truth may be, the intent was, that if the Plaintiff put her out for a day, the Defendant would pay for a year: But then by Twisden the demand should have been of the whole year, or at least pro rata, in consideration H. would place her abroad with any Mistris, the Defendant would pay for a year. Judgment for the Plaintiff.

Carrington

Carrington *againſt* Harway.

THe Plaintiff being Merchant reſident in Spain made a Letter of Attorny there in Spaniſh, to acknowledge ſatisfaction on a Judgment here Recoꝛded againſt the Defendant; and now on Affidavit of the receit thereof, and that its truly tranſlated into Engliſh, Biſh pꝛayed ſatisfaction might be acknowledged by the Attoꝛnies named therein, which the Court refuſed without Teſtimony of the ſealing and delivery of it as his Dæd, noꝛ then, having beſoꝛe aſſigned it oveꝛ to one Cocke, which being in ſatisfaction of Juſt Debt, is not Revocable. (69) Attorny.

The King *againſt* Ring. Ante.

Wedneſday, No. 16.

HE was Indicted foꝛ foꝛging Bargain and Sale of Keymer, and Enrolment, which was 1652. Eleven Monthꝭ beſoꝛe the acknowledgment, which by Coleman was aſſigned foꝛ Eꝛꝛoꝛ, having relinquiſht the Plea of his Coꝛonation Pardon after Conviction and beſoꝛe Judgment, which was 1663. Alſo its not ſhewed in what Court it was enrolled, Yelverton 213. 2 Cr. 291. and ſecundum formam Statuti is not ſufficient, noꝛ to ſay it was at Weſtminſter: But by Windham in Indictment of Foꝛgery its well enough, and the ignoꝛance oꝛ miſpꝛiſion of the party ſhall not excuſe the crime; but otherwayꝭ if one were to make an effectual Title, which the Court agreed: Alſo its ſaid, he affixed the Seal of H. only ad damnum iplorum H. and H. which is impoſſible; The Court conceived, that if the party be any wayꝭ moleſted, its enough, though deed be ineffectual; as to paſs an Eſtate in futuro; alſo the Statute is, if it be made to ſuch intent, its ſufficient Foꝛgery. (70) Forgery.

Leet *against* the Bishop of Exeter.

(71) Tyths. STroud prayed a Prohibition to the Bishops Court at Exeter on Modus alledged that the King is seised of the Forest of Dartmore, and payeth 3 l. per Annum to the Parson of Litford in discharge of all Tyths of him and his Tenants; Sed per Curiam this is no ground for Prohibition, the Suit being by the Parson of Dartmore, another person; but they must have prescribed generally in non decimando, the King being persona mixta.

The King *against* Cumber.

(72) Sheriffs. THe Court granted Attachment against a Bailiff who on a Latitat Arrested J.S. and he being escaped, they distrained his Cattle, and no Pound being in the Hundred, they drove them into Chichester, and there attached them by Custom on Plaint in that Franchise, and would not suffer Replevin of them; and although he were no Attorny, yet this being an oppression to the people, it was granted; as also because such Beasts in the Pound cannot be Attacht. And by Windham, this is a usual trick to defeat the Jurisdiction of this Court, and Bailiffs will drive them by night into such Franchises; and although the party had brought Trespass, which is yet pending for this illegal Distress, yet the Court granted it on motion.

Siderf. 228. pl. 25. Petto & Uxor *against* Ruddock.

Tr. 16 Car. 2. Rot. 1403.

(73) Baron & Feme. IN Debt by Baron & Feme as Administrators, not shewing, as 2 Cr. 10. Wade *against* Atkinson, that Administration was committed to her, nor by what power. 2. Its alledged that the Intestate had not paid it; for which Causes the Defendants demurred generally to the Count, Sed non Allocatur, for adhuc detinet is sufficient: Also it lieth not in the Plaintiffs knowledge that the Defendant is Administrator, and therefore need only alledge him Administrator ut dicitur, and by Vicar general of the Bishop; but the Plaintiff must intitle himself. Judgment for the Plaintiff.

Maudit

Maudit *against* Manning.

Thursday, No. 17.

WIld prayed Bail taken 24 Car. 1. by Justice Bacon, and entred in his Book only (there being no Bail piece) for Prosecution of Writ of Error, with effect, according to the Statute, and to pay the Condemnation on affirmation, the parties being yet living that were Bail, that their Recognizance might now be entred on Record, the Action being Action of Debt: But the Clerk of the Errors, that took the Recognizance, is dead, and the Writ is returnable in Parliament the Term after, and discontinued there, and no Judgment affirmed, which the Court denied, because on the Plaintiffs shewing there is no default in the Bail, but only a doubt whither the prosecution were with effect to make one in Custodia; were it res integra, Bail may be filed after his Death; but not here. (74) Bail.

Ellis *against* Jackson.

IN Assault and Battery, the Defendant pleads not guilty; and as to false Imprisonment, the Defendant Justifies on Non omittas out of C. B. directed to the Sheriff of Lincoln, returnable Oct. Pur. which was delivered to the Sheriff, and his Bailiff arrested the Defendant the tenth day of February, which was the day after the Essoin-day, which in Law is the day of the Return, but before the 4 die post, which was found by Special Verdict. Stroud for the Plaintiff, Moor 711. Woolly *against* Mosely, that the 4 die post is only for Appearance and Return of the Writ, but not for Execution 3 Cr. 180. and 33 H. 6. 45. b. in Account, the Distringas was Ret. Oct. Mart. which was a Sunday, and the Nisi prius the next day, and by Choak, agreed by Prisot, that one may have Trespass on Arrest after the first day, Jour Br. The Court held clearly that after the day of Return, the Sheriff cannot execute it, but on the Return day he may; the 4 die post is but a day of Grace to save defaults, and unless the Defaults be made, there is never any Entry on the Roll of the 4 die post, this is the reason of Shellyes Case. (75) Trespass.

Judgment for the Plaintiff, Nisi.

Bourman

Bourman *against* Acton. Ante.

(76) Covenant.

IN Covenant as Executor, against the Defendant as Executor of Eltonhead, on devise to the Plaintiff of two Ballast Wharfs in Woollage, and a way through the Lands of Eltonhead to Pits to dig Ballast, and Covenanted that neither E. nor his Assigns, or Under-Tenants shall dig in the Pits of the said E. any Gravel, except only for repairs. The Plaintiff alledgeth that one Brent an Under-Tenant digged; the Defendant taketh Issue thereon, that he was not Subtenant modo & forma, on which Special Verdict find that Parke, Lessee of E. made a Lease of the Pits to Hull for part of his Term, H. Assigns to B. & si B. be Sub-Tenant according to the Covenant, they find for the Plaintiff. And Jones for the Plaintiff, that this Under-Tenant shall not be intended only Tenant of the Pits only, as E. is, but generally any of the Sub-Tenants of E. of any other place: Also the Plaintiff hath only liberty to Dig, but no Interest, and so as well Tortfesors as rightful Diggings, the strongest against the Covenantor are restrained: Also he cannot be Sub-Tenant, unless there be a Mesne Estate, or Reversions; and in Ordinary Speech, Sub-Tenant is taken for any that cometh in under the same Title. Scrogs for the Defendant, B. is no Under-Tenant to E. for Debt lieth not against him; had the words been, None claiming under him should Dig, it had been for the Plaintiff, but Ejus tenens he cannot be no more then if E. had been dead at the time; and non constat to the Court that E. is living, and so the Conclusion of the Verdict, that if B. were Under-Tenant to E. at the time of the Bill, or not, &c. is ill Sed per Curiam, one may be Under-Tenant, although the Lessor be dead, and the time or place is but added for Form, and not to be found: Also Under-Tenant is any that cometh in under the Lessors interest, Brumfield *against* Williamson, Covenant that he and his Assigns would pay Rent, adjudged here that the Tenant at Will or his Assignée is within the meaning thereof: So by Hyde, Lease of 99 years of Copihold, which hath Common in Waste, which Covenant that he nor his Assigns shall not use the Waste with Cattle, if his Under Assignee of part put in Cattle it's a Breach.

Judgment for the Plaintiff.

Mason

Maſon *againſt* Tredway. Saturday, No. 19.

IN Ejectment by Verdict found, that Sir Robert Tredway demiſed to Tyrrel for 1000 years in truſt for payment of Mony to Children of Lamin; They find that the Leſſée releaſt to the Leſſor, being in poſſeſſion, & ſi, pro Plaintiff. Bigland conceived that had the Leſſée been in poſſeſſion, nil operatur, though the words be remiſe, releaſe, diſcharge, and for ever quit claim the ſaid Mortgage, &c. all the eſtate, right, title, intereſt, claim, and demand whatſoever, 1 Inſt. 307. b. 3 Cr. 21. pl. 2. Wakefords Caſe, for this cannot inure as a Releaſe, nor as a Surrender, which muſt have proper words, 2 Cr. 169. and it ſhall not be good by way of Grant, 5 Co. 15. of Eccleſiaſtick perſons, Litt. Sect. 331. 1 Co. 76. being not extendable to any other ſenſe, 1 Inſt. 30. b. Dyer 251. as Grant, Feoffment, &c. may. The Caſe of 12 Car. 1. Rot. 235. Johnſon *againſt* Trumper, Leſſée for 30 years demiſeth the Remainder of the years after the death of the Wife to two Sons, one died in the life of the Wife, and then the other releaſt to him in the Reverſion, which on Special Verdict was held void, as a Grant, becauſe it's but a poſſibility; but it was held per Curiam, præter Bramſton, to be good by way of cronération: But in our Caſe there is a poſſeſſion to be transferred, which may be done another way. 2. Here is poſſeſſion found, but neither rightful nor in privity, and ſo not ſufficient for Releaſe, 7 Ed. 4. 27. 2 Ed. 4. 6. in 4 Co. Kite *againſt* Quinton, ſuch Releaſe to Copyholder in fact is good, the privity being created by the Lords admittance, 2 Cr. 169. Butler *againſt* Duckmonton. Raymond for the Defendant, That this paſſeth by way of Surrender; he agreed the Caſes cited, but conceived the word diſcharge, Perk. Sect. 607. doth make it a Surrender, being a ſufficient declaration of Aſſent to waive the Term, 41 Ed. 3. 23. pl. 24. Penruddock *againſt* Newman, & 3 Cr. 488. and that the other party ſhall have it; and this is the end and intent of the parties on the Deed which was mortgaged, which by order of the late Powers, on payment of the Mony in to Haberdaſhers-Hall for the Malignancy of Lamin, who was likewiſe ordered to releaſe to the Leſſées in truſt, and that they ſhould releaſe to the Mortgager. (77) Surrender.

1. Windham ſaid a difference was taken betwixt a Leaſe for life and years in Johnſons Caſe, where the words were only remiſe, releaſe, yet for Leaſe for years, being but a Contract, although the Leſſée were not in poſſeſſion, yet it's well, as aſſent, contrary of Leaſe for Life: Alſo to enlarge an Eſtate, there

there must be privity, but need not be so on discharge or extinguishment of right, but that is most properly to men that have no privity; and if the Lease be turned to a right, it's as Release of Disseisée to Disseisor: Also a Contract may be dissolved by Contract, and if not, it's clearly good enough.

2. Twisden, It's not found that the Lessée ever entred, so he cannot Surrender. Also although the Law be, that a Release to H. that enters into my Land is good, yet very good Opinion agreed with Littleton, that such Release is void, because uncertain whether such be Tenant at sufferance, or at will. Also this is not like the Case of Copyholder, whose Release to the Lord is a good Release, 10 Co. Lampets Case, Release by Termor to Disseisor extincts his Term, but carrieth nothing to the Disseisor. Adjornatur.

Siderf. 230. pl. 29. Brown *against* Purchase.

(78) Administrator.

IN Debt on Obligation against Administrator, she pleads that Judgment before was had against her by J. S. (in declaration on Obligation made by the Intestate Smith) and doth not aver that the Intestate devenit obligatus, for which cause Wild demurred, because the Recovery pleaded must be of as high a nature as the Action now brought; but it being averred that it was had for just debt, and that it was not paid by the Testator, the Court conceived it is well enough, Co. Entr. 148. as Smallpeece *against* Smallpeece: And by Windham, the Administrator cannot know the date of the Bond, nor need demand Oyer, and therefore need not say devenit obligatus, however the Presidents both ways are well enough; and if there were no Bond, although the debt were just on simple Contract, yet it's evidence of Fraud.

Judgment for the Defendant, Nisi.

Williams and the Justices of Sown of Bedford *against* Becket.

(79) Force.

SErjeant Hyde prayed Restitution on Indictment of Force, removed hither by the Prosecutor. Hyde Chief Justice conceived, that only the Justices that take the Inquisition are bound to make Restitution, and that only, by Windham, de Communi Jure, not whether a tort or a droit; but this Court, or the Judges of Assize are not bound, but it's in their discretion, which Twisden denied; and that the Statute of 31 Eliz. gives the three years possession, which could not else have been pleaded,

held both manifeſt Errors, and aſſignable by the Defendant, the Verdict being not to be taken by parcels, nor the Judgment.

Judgment ſtaid.

Siderf. 218. pl. 2. Bickerſtaff *againſt* Purdieu. Ante.

IN debt by Adminiſtrator on Leaſe for years made by the Teſtator to J. S. by virtue of which he was poſſeſſed, the Reverſion inde to the Plaintiff on Nil detinet, and Verdict for the Plaintiff. Wild in Arreſt of Judgment moved, that it doth not appear what Eſtate the Inteſtate had in Reverſion, either in Fee, or longer term for years: But by Goodfellow, after Verdict it's aided by virtute cujus, as Sanders's Caſe, 5 Co. 12. Aſſignment by Leſſee excepting the Trees, & Dyer 69. & 3 Cr. 716. & 7 H. 7. 3. Pl. Com. 502. Grendons Caſe, in that it's ſaid the Leſſee entred, & adhuc detinet. Windham conceived this Action favoured, and the omiſſion of a mean Aſſignment of the Defendant well enough: And per Curiam, the Title of the Plaintiff is ſufficiently found. (85) Adminiſtrator.

Davie *againſt* Fox.

BErtue prayed Amendment of a Tranſcript of Record out of Inferiour Court, on Affidavit that the Record below was right, but the Clerk here miſtook, which the Court refuſed. But by Windham, were the miſtake in the writing over the Record of Inferiour Court, it's amendable. (86) Amendment.

Prior *againſt* Powers.

IN an Action upon the Caſe for miſuſing a Horſe, Orlaby prayed a new Trial, becauſe the Jurors in Bedfordſhire being divided ſix and ſix, they agreed by Lot, putting two Sixpences into a Hat, that which the Bailiff took, that way the Verdict ſhould go, which was for the Plaintiff, and 2 d. Damages; but the Court denied it, becauſe it appeared only by Pumping a Juryman, who confeſſed all; but being againſt himſelf, it was not much regarded. Alſo the Court cannot grant new Trial without puniſhing the Jury, which cannot be by this Confeſſion againſt themſelves: And by Windham, this is as good a way of deciſion as by the ſtrongeſt Body, which is the uſual way, and is ſuitable in ſuch Caſes to the Law of God. Twiſden doubted it would be of ill example, and in Sir Philip Acton Caſe, on ſuch Verdict, on fillip of Counter, a new Trial was granted, but here it was denied. (87) Trials.

Scurre *against* the Archbishop of York.

Tuesday, Nov. 22.

(88) Prohibition. Sider. 232. pl. 34.

SYmson prayed a Prohibition on 13 Car. 2. cap. 12. an Accusation by the Archbishop of the party for sitting in the Church with his Hat on, requiring him to answer upon Oath, which by Hyde and Windham he may, the thing being publick of which he is charged, and not private in his own breast only; and the course of all those Courts is to answer on Oath, as the Oath in the Star-Chamber they objected by Bill, to which they required an Oath; but this the party may answer generally Not guilty, or particularly; but Twisden contrà, totis viribus, & Adjornatur till the Opinion of the other Judges be known. Also the Oath ex officio is general to answer such Questions as should be objected, not the answering of particular Crime objected. Post.

Alderman Crips *against* the Mayor and Jurats of Maidstone. Ante.

(89) Mandamus.

ON a new Mandamus to restore him, being again turned out, They return that their Charter is, That such shall continue during life, 2 Cr. 540. Warrens Case, & Estwicks Case, Stiles 43. pl. 93. if it seem expedient to the Mayor and Jurats to continue him, and that it did not seem expedient, and therefore they put him out; which, by Wild the Kings Serjeant, this being an Office, and Member of the Corporation, they cannot ad libitum turn him out; as a Counsel or Steward, as Blagraves Case, they may. 2. Although it be said he shall continue, if it shall seem expedient, it doth not imply that they might turn him out if it shall seem expedient, 1 Inst. 204. b. But by Coleman for the Corporation, The Return of Blagraves Case was only that the Corporation of Redding might elect a Steward who was to continue during Life at their will and pleasure: Also it's consistent to an Officer to be during pleasure of those to whom he is an Officer; thus the Judges; and the King may as well make such in an Inferiour Corporation: Also the word Si is a Limitation, and all one with power to turn out in a Return, although not in Pleading. Windham said it was expressly Returned in Blagraves Case, that they might amove, which is herein wanting; and Si, as 1 Inst. 204. b. makes no Condition unless it be added quod tunc. Also it seemed

seemed good that he should be a Jurat during Life when they elected him; and by Law this makes no Tenancy at will, but only a power to Elect or not, at pleasure; and so the Question of custom to turn out at pleasure is out of the Case. Twisden, They are not to be turned out without cause, as 2 Cr. 540. Warrens Case, a Counsel is but to them as Steward to a private Lord, turnable out at pleasure. Also it's repugnant to say he can be Jurat for life at their pleasure. Hyde accorded that the Return is insufficient; this Jurat differs not from Alderman in another Town; were their Charter to turn out ad libitum, they ought to do it for a reasonable Cause, this being a free Custom, which is as favourable as Freehold of the party on Magna Charta. Restitution awarded per Curiam; and Stroud Recorder of Burford, was restored, although they had power to turn out at will for want of Cause.

Proby *against* Marquess of Dorchester.

(90) Slander.

ERror of a Judgment in C. B. in Action upon the Case for words on 2. R. 2. De Scandalis Magnatum, My Lord of D. is no more to be valued then the Dog that lieth there. North for the Plaintiff, the words are only said falsa, not falsa nova, or mendacia, or scandalosa, as C. Entr. 593. Also there is no Averment that any Dog lay there by, at the time, but innuendo quendam canem ad tunc ibidem jacent', which being reference to a thing that is appearing to the hearers, ought to be; contrà if it did not appear; as to say H. killed the Wife of J. S. it need not be said she was dead: Also a Man is not to be valued, because above all value, as in Appeal De morte hominis, no Damages, no more of Dogs, which are below value, and no Larceny can be of them: Also all the Cases on this Statute are either, something they said not, as Crumpt. Jurisd. 13. C. Entr. 593. or of something they did not, or some imputation of an Evil mind; but these words are neither what he said, did, or thought, but only as 2 Cr. 196. in which is no Judgment; Also the Judgment ought to have been Capiatur. Maynard for the Defendant, This is as great a Scandal almost as can be, and an occasion of discord, and as much as if it had been said he were of no value, worth, or honour at all, 3 Cr. 192. Lord of Winchesters Case, being spoken malitiosè; although it might be done legally, yet being spoken in disgrace, may be occasion of discord; Actions lye for Peers that tend to prejudice of Honour, although common persons cannot have it without loss: Also on Indictment, there ought to be Capiatur, but never

never in Action upon the Statute. Also the words are well enough, whither any Dog were there or not. Windham conceived, that if it had been said he valued my Lord no more, it would not have been Actionable; but here is a general value put on him, without Issue de injuria sua propria found for my Lord on Justification by the Defendant, that they were spoken with regard to his Power, must not be intended in any good Sense, as when in Equilibro. Adjornatur, But the Court inclined the words were Actionable, and that as the Lord Say *against* Stephens, no Capiatur is ever entred in such Action upon the Statute.

The King *against* Cornhil.

(91) Trades. IN Indictment for seducing an Apprentice removed out of London after Verdict, and Judgment here affirmed, the Defendant brings a Writ of Error here of the same Judgment, which by Brewer is without all president, the Rule in 4 Inst. being general, that it ought to be in the House of Lords, as the president of 27 H. 8. 16. In Cond. Br. 7. and Sir Thomas Metham Case, temps R. 2. in a Criminal Cause. Hyde said that if A. be Attainted of Felony, the Writ of Error must be here, which Twisden agreed as Error of Judgment before the High Steward, 3 Inst. Chap. de Attainder. But by Windham, Errors in Fact are only Assignable, not in Law of the Judgment: But per Curiam, this is no Supersedeas of Execution; therefore it was awarded, Nisi. Also the Judgment is only Capiatur, and no Fine set, which is but Interlocutory, and the party must appear in person before he can Assign Error.

Edwards *against* . . . . .

(92) Slander. IN Action upon the Case for saying He was a Traytor to the King; And at another time That he is a Traytor to the King. Williams after Verdict moved in Arrest of Judgment, because the former words are not Actionable, in regard it doth not appear they were spoken since the Act of Oblivion, and intire Damages being given, its for the Defendant. But by Baldwin for the Plaintiff, hereby it shall be intended that he continueth a Traytor, as in the Case of Sir William Roberts in the Exchequer, 13 Car. 2. was adjudged, on saying He was one of those Rebells that brought the King to the Block, which the Court, Hyde & Keeling Absentibus, accorded.

Judgment for the Plaintiff.

Sir

Sir John Lenthall *againſt* Lord Laudoris.

Wedneſday, No. 23.

GLyn moved for the Defendant, who was joyntly bound with one Leſly for the true Impriſonment of L. and Warrant of Attorny to confeſs Judgment on Eſcape of L. which being a way for Eaſe only, and Judgment entred without any Trial of the Eſcape to ſet it aſide. But by Wild Kings Serjeant, its to be entred on Action brought, which is brought, and the parties at Iſſue, but no farther Proſecution; but Sir J. Aſſigned his Security to the Creditor, which, per Curiam is well enough; there appearing no fraud, they refuſed to ſet aſide the Judgment. (93) Eſcape.

Selby *againſt* Walker.

IN Debt upon Bond given to the Plaintiff to perform Covenants between the Defendant as Aſſignee, for the benefit of the other Creditors, and the Commiſſioners of Bankrupts which was inter alia to give an account to the other Creditors or to either of their Aſſigns; on Requeſt the Plaintiff ſaid he had not given him an account in his Replication, (the Defendant having pleaded performance in Bar) to which the Defendant demurred, becauſe by Weſton the Covenant is joynt as to the Creditors, to which the Court inclined, and although as Windhams Caſe the matter were ſeveral; yet there being a ſubſequent Clauſe ſeveral as to the Aſſigns, it cannot be intended otherwiſe. 2. The Action was laid at St. Mary le Bow in Ward de Cheap, and the Plaintiff ſaith quod ad tunc & ibidem he requeſted the account, which the Court conceived incertain, as appointment of Hundred or general place. But by Jones for the Plaintiff, whereever it was that the Requeſt was, the Accompt muſt be alſo. Sed Adjornatur. (94) Bankrupt.

Middleton *againſt* Talbot Manucaptor of Sylveſter. Ante.

IN Scire facias the Defendant pleads that the Priſoner was committed in Cuſtody in exoneratione Manucaptorum before the Action brought, & hoc paratus eſt verificare, to which it was demurred, becauſe it ſhould have been prout patet per Recordum, which the Court agreed. (95) Bail.

Judgment for the Plaintiff, Niſi.

Collins

Siderf. 234. pl. 37. Collins *against* Sanders. Ante.

(96) Visne. IN an Action of Covenant in London on Bottomree, The Defendant pleads the Ship was cast away at Falmouth in a Foreign County, to which the Plaintiff demurred, it being a transitory Action and Plea, as 6 Ed. 4. 46. and Dixon *against* Williams, Hill. 1655. Rot. 864. in an Action for not allowing Meat, Drink, and Lodging, laid in Middlesex. The Defendant pleaded departure in London, and swore his Plea, which is not due here; and yet Judgment for the Plaintiff affirmd in Writ of Error. Coleman for the Defendant, by Traverse of the same matter in the Declaration, cannot alter the place; contrà if it be new matter which accords with the Count, and ariseth from the Covenant it self; Sed curia contrà; and Dixons Case is unanswerable; The Old Books are as Coleman cited. Judgment for the Plaintiff.

In Cond. Br. 133. Culpepper *against* Austin.

(97) Fines. IN Debt upon Obligation, on Oyer demanded, the Condition was to levy a Fine (not saying to whom) at the Costs of the Obligor, now Defendant, and he to pay within ten days of the levying of it. The Defendant pleads no Fine was levied by the Wife of the Plaintiff, according to the Condition de terr a præfati Strangford; To which the Plaintiff demurred on 5 Co. 127. Palmers Case, and Hutt. 48. Waldron and Hill, because its not aver'd that the Defendant brought any Writ of Covenant, Sed non Allocatur. For, per Curiam, the Law is now changed, and the Fine levied before any Writ entred, and therefore must be done by the Plaintiff without any Writ; and there being a Fine really levied, by the Plaintiff, after the time in the Condition, and this demurrer on suddain, the Court, on the Prayer of Wild for the Plaintiff, gave leave to discontinue.

Gurny *against* Pilkington, Executor of Manning.

(98) Enfant. IN an Action upon the Case against the Defendant as Executor, after Judgment, Baldwin assigned for Error, that he was an Infant, and no Guardian made, to which in nullo est pleaded, which being confession of the Plea, the Court (on 2 Cr. 420. & 440. and one Rumnies Case Executor of Carew, where Judgment was reverst, because one of the

the Executors was an Infant, and not by Guardian) conceived it manifest Error. Judgment reverst.

Locke *against* Etherington. Ante.

Thursday, Nov. 24.

COleman for the Plaintiff in the Scire facias, that this Judgment is not pardoned in the hands of the Debtor, for General words in the Statute are restrained to the intent, as on the Statute of 21 Jac. 16. of Limitations, Slander of Title or Magnatum are not included: So Stradling *against* Morgan, Pl. Com. all Receivers are restrained to Receivers of the King. Also the Debtor hath committed no Offence, and therefore is not capable of pardon, as the Felo de se is, and his Administrator cannot take here, because there were no words of Restitution, which are necessary after Office, though the Kings own debt, on his lending Mony, or on Assignment, which is in lieu, should be pardoned, yet there is no other person to whom the pardon can relate, but here there is, and the Debtor is a third person no ways concerned in the Crime or Forfeiture, P. 9 Jac. Lane 117. Chamberlains Case. 2. This would introduce a general Inconvenience, that all the Judgments due to Outlawed persons would be pardoned, for there are no words of Restitution to such persons Utlawed, but they are as King *against* Ward, in the same Case with Felo de se, and his Executors, Vicount Dunbars Case, 1 Cr. 349. on 20 Jac. cap. 35. is on the whole the same with this Case at Barr: And the Case of Sir G. Binion is not like this, he was Receiver, and debt of J. S. assigned by him to the King was excepted, and by Equity the debt of the Receiver and the Assignee are the same: Also 5 Co. Wirrals Case, two bound to H. Utlawed, on pardon it was said, that had not such Exception been, it had been pardoned; and there was never any express Resolution on the Body of this Act, that it's pardoned. 3. Modo subditus is not sufficient Title, 11 H. 7. 25. pl. 4. it's ill, as Pl. Com. 376. Zouch *against* Stowels Case: Also 2 Ed. 6. may be aver'd or not, it being not laid on the Plaintiff to aver himself a Subject, but on the Defendant, 9 Co. Evesque de Salisbury nuper Episc. doth imply he is not so now. Powis for the Defendant, There needs no Averment at all, but it shall be intended, till the contrary be alledged against him, 12 H. 8. 3. a. b pl. 3. 8 Ed. 4. 7. Pl. Com. 103. where the Proviso is from the Body of the Act, it must be aver'd, 11 H. 7. 24. pl. 2. also where the Body of the Act extends only to some par- (99) Pardon.

particular persons, as 16 H. 7. 2. but where the Statute is general, and so of Proviso, as in our Case, it need not, 1 Inst. 244. a. also a Subject shall be intended natural in digniori sensu, 6 Co. 20. Also this is within the words of the Pardon, which are of all Sums of Mony, & nil refert whether it be immediately or mediately due to the King; also if it had been named, doubtless it had been pardoned; and here the words are as large, Kell. 198. Dyer 249. and to be taken by Equity against the King, P. 1661. 13 Car. 2. in the Exchequer, Sir G. Binions Case Receiver, after Inquisition found that one Tourner was in debt to Sir G. B. Scire facias was against him, to which he pleaded the Act of Oblivion; to which the Attorny demurred, because it was but a debt in aid, and this Process made use of only by the Receiver in the Kings Name, as his Priviledge is, here it was adjudged that it was pardoned, and then Mr. Attorny relinquished his demurrer, and pleaded that the King was only Trustee, and his name used for Sir G. B's. use (which did not before appear on Record) and now adjudged that it was not pardoned. Adjornatur.

Bucknels Case *against* the Fermers of Excise.

(100) Taxes. COleman moved for a Certiorari to remove three Informations exhibited against him before the Commissioners of Excise, which Jones on the Act of 12 Car. 2. cap. 24. of taking away the Court of Wards opposed, because there is an Appeal given to the next Sessions, and a Clause that no Certiorari shall be allowed: But yet, by Coleman, this Court is not excluded to send one to the Commissioners, but only to the Sessions in the Country: Also the party hath Election either to pray Certiorari, or to appeal to other Comissioners. Also this Clause ariseth on 15 Car. 2. an additional Act against Brewers, 12 Car. 2. 23. §. 35. which makes these Offences, and the Penalties thereof, in which there is no negative words: The Court inclined it lay not; but they ordered the Fermors to shew cause why it should not go, which was all one as to deny it, for they give Judgment and make Execution one day, upon an Information the other, and the Court would not stay Proceedings in the mean time, so can never try the Question.

Scurre

Scurre *against* the Archbiſhop of York. Ante.

SYmſon prayed a Prohibition quouſque Copia of the Libell were delivered, which, by Windham, ought not to be, as 2 Inſt. Art. Cler. on the preſentment of Church-Wardens, becauſe there are no Libels in ſuch Caſes, to which Hyde Chief Juſtice inclined. But by Twiſden, who ſaid, that if there be no Libel, or if Libel were before had, they may proceed in the Eccleſiaſtical Court; which Keeling agreed; and that every charge is within the Law of 2 H. 5. (101) Prohibition.

Adjornatur.

Randall *against* Keite. Ante.

Friday, No. 25.

IN Debt on Bond, condition to appear to Action ſplit in a Court Baron, and anſwer the Coſts and Condemnation by a day. The Defendant on Oyer pleaded 23 H. 6. cap. 10. that he was Attacht by his Goods by Proceſs out of the Court, and deteined till by the procurement of the Bailiff he entred it to him; to which the Plaintiff demurred: And by Jones, this is a good Plea, the Bailiffs of Court Baron being within the words of the Law; but however its void by Common Law. Paulet for the Plaintiff; this Proceſs is only by Attachment of Goods, and not by Arreſt of the party, and ſo no ſuch miſchief, as in the Caſe of Beaufage, 5 Co. 100. for at Common Law the Sheriff might have deteined the Body till delivered by Writ of Manucaption, which was alſo left to the liberty of the Sheriff to chuſe his Security; and now he is ordered to be delivered on ſufficient Bond; and the only meaning was to diſcharge the perſon, Dyer 199. pl. 54. Hub. 15. Norton *against* Syms. Keeling, This being agreed to be taken in diſcharge of Goods, and by perſons that ought, to take Bail as Miniſters, which are not meant of Sheriffs Miniſters only, but others, all being bound to take Bail in any civil Cauſe, and that for appearance only; and this is farther. (102) Sheriffs.

Adjornatur.

Grinſwell *againſt* Sir Anthony Aucher.

(103) Condition. IN Debt upon Obligation, Condition to pay when the Kings Majeſty ſhall be reſtored by Conqueſt, Accomodation, or otherways, the difference between him and his Parliament being recited: The Defendant pleaded that King Charles the firſt was beheaded, and never reſtored to his Crown in Peace, according to the Condition: To which the Plaintiff demurred. And by Hyde and Keeling, this may be intended in his Politick Capacity, which never dyeth: Alſo had the words been ſpoken after his death, none could think it tyed to his perſon: Sed Twiſden & Windham contrà, This appears to be perſonally meant of the King that was then in difference, &c. Adjornatur.

Wadſworth *againſt* Executors of Guy.

(104) Trades. IN Covenant to inſtruct an Apprentice, or cauſe him to be Inſtructed in the Trade of a Sadler, and to find him Meat, Drink, and Lodging, during the Term: The Plaintiff ſheweth the Teſtators death, and that ſuch a day he was turned out of doors by the Defendant, & ſic conventionem fregit in hoc, viz. not inſtructing him, and not finding Meat and Drink: To which the Defendant demurred, becauſe that is a perſonal Covenant, and diſcharged by death, and cannot be aſſigned, as Hub. 134. & 216. & 48 Ed. 3. 2. being no Cuſtom: But all the Court inclined, had it been only to inſtruct, it had been diſcharged; And being compler to inſtruct and find Meat is not; and if it were, yet the Breach is ſufficiently aſſigned, if either part be true, as here, in turning him out. Judgment for the Plaintiff.

Butler *againſt* Lydiat.

(105) Slander. IN Action upon the Caſe for words ſpoken at ſeveral days; The Defendant pleads that the words were not ſpoken within two years before the Action; to which Jones demurred, and ſheweth for Cauſe ſpecially, that it ought to be ſeveral Iſſues, as in Debt for 20 l. nil debet to 20 l. modo & forma, and is not ſufficient, without ſaying nec aliquid denarium inde, on ſpecial demurrer. Raymond contrà, This is as well as 7 Car. 1 Cr. Engliſhes Caſe, Non Aſſumpſit pleaded to ſeveral Aſſumpſits. Sed per Curiam, clearly this is General Iſſue, that goeth to all; and had it been Not-guilty within two years,

years, its well enough: And this Plea, Non locutus, making no Issue till the Plaintiff replyed quod locutus fuit infrà two years, is also well enough, per Curiam, and if the Plaintiff prove any of them spoken within the time, its for him. Sed Adjornatur.

Shepherd *against* Spencer.

IN Debt on Bond, Condition to pay such a Sum as Eliz. Barry should appoint, after Marriage with the Defendant, by her last Will, or other writing, signed and subscribed in tiel form by her: The Defendant said she made no Will, nor by other Writing in tiel form appointed. The Plaintiff sets an appointment in Writing forth; the Defendant said that it was after revoked; to which the Plaintiff demurred, because this is a departure, and also its not revocable; Sed curia contrà, this is only fortification of the Bar, and could not be foreseen: Also this is pleaded as a Will, as much as can be, and not like the Case of Dean *against* Eason. Also if it be no Will, to say she made no Writing in tiel form, is a Linsy-Woolsy, and no sufficient Title. The Court conceived the Lord Ormonds Case, Hub. a strange Case, that such Writing in nature of a Will, and voluntary, although it had not the form, In the Name of God Amen, should not be revocable. Judgment for the Defendant, Nisi. (106) Condition.

Soper *against* Morgan.

A Feoffment by Dedi & concessi per Curiam in Action against the Feoffor, doth not Warrant Action of Covenant on Eviction of the Inheritance, but it must be deduced in the real lien by Warranty: But in Case of a Freehold only, its ground for Covenant, as Hub. 3 & 4. In Cond. Br. 141. and here the Case was in Action of Covenant, brought by the Lessee for years, on Breach of Covenant; the Lessor pleaded that the Dean and Chapter of D. entred on him, and evicted him: To which the Plaintiff demurred; but there being other restrictive Covenants. (107) Warranty.

Judgment for the Defendant, Nisi.

Felgate

Felgate *against* Tourner.

(108) Bail. FElgate recovered against Mole, and on Scire Facias against Turner, as Bail, Judgment was had, and after set aside by Rule, as irregular; whereupon Tourner in Trespass recovered 140 l. which was before recovered against him, and afterwards on the former Rule, for vacating the Judgment, doth devise an entry on the Roll, whereby he was to have Restitution for the same Mony on the Judgment., which, by Wild & Curiam, is never used on Rule to vacat Judgment, but Restitution is awarded: Also by Rule, and by Scire facias on such entry, Tourner had Judgment and Execution; Felgate having after the former Recovery, by a rightful Judgment, gotten his Debt of Tourner: And now Felgate brings Trespass against Tourner, who pleads this last entry in Bar, which the Court ordered to be expunged: and by Twisden, the first Recovery of Tourner was illegal.

Richardson *against* Elliot.

(109) Cattle. IN Action upon the Case on promise to redeliver a Dog Lurcher, toties quoties he should come to the Defendants Custody; the Plaintiff sheweth, that 28 No. he lost the Dog, and the 29 he came to the Defendants Custody, and that 30 he demanded, and the Defendant refused to deliver him. The Defendant sayeth, that Postea, at the same place, on the same 29 No. she delivered the Dog, and doth not Traverse absque hoc that she was Not-guilty before, or after, for which Cause Jones demurred, this being a continuing Act, and not any particular Matter: But per Curiam, on 12 Ed. 4. 6. and Lee *against* Rains Case, there needs no Traverse, when both parties agree in the Time and Place; and the demand is Idle on the 30 No. unless it had been alledged, that then the Plaintiff had lost the Dog, & adhuc reculat to redeliver, will not imply any other loss.

Judgment for the Defendant.

Becke *against* Cavalier.

(110) Baron & Feme. AFter Imparlance as Feme sole in Trespass, and Assault, the Defendant pleads, that at the time of the Bill exhibited she was Covert, and concludes in Bar: And by Barwell for the Plaintiff, this is but as a Plea in Abatement, and therefore prayed Respond. ouster, which the Court granted, Nisi.

Becon

Error, Br. 84. Becon *against* Sewell.

IN Treſpaſs for taking a Bull, and Judgment for the Plaintiff in C. B. and Error here brought, the Plaintiff in the Writ of Error by Affidavit, ſuggeſted that one of the Plaintiffs in the Writ of Error was dead, which the Court diſallowed, as a trick only to ſave double Coſts, and to make the new Writ of Error a Superſedeas, this being abated by the Act of God, and if true, it ſhould be ſuggeſted on the Roll (although it cannot be pleaded) by venit J. S. &c. & dat Curiæ intelligi, &c. Judgment affirmed. (111) Abatement. Siderf. 235. pl. 40.

WIndham and Keeling conceived on 1 Eliz. 18. that the Admiral hath diviſum Imperium to remove Nuſances in Navigable Rivers: But by Twiſden, this is only in particular Caſes, and 1 Eliz. cap. 18. is expired. The Court refuſed to ſtay Proceedings, or grant Prohibition. (112) Admiral.

Rider *against* Beal.

Saturday, Nov. 26.

THe Court conceived the Indebitatus for Tythes after Verdict may be intended good, that they were a portion of Tythes given by the Abbot to the Vicar, and therefore Judgment for the Plaintiff. (113) Tythes.

The King *against* Pain. Ante.

COleman prayed alias Certiorari to Norwich, or that the Clerk of the Peace may come in and amend the Order returned, being in the Preterperfect Tenſe, Ordinatum fuit prout ſequitur; This the Court refuſed in The King *against* Alcock, and would not amend omiſſion of contrà Pacem, omitted in an Order of Inferiour Court in Middleſex, which the Court agreed; but were divided whether new Certiorari ſhould be awarded, becauſe elſe the King would loſe his Fine, which was ſet on Jurors for Contempt in Court, not on Indictment or Preſentment: And by Windham, it's not reaſonable the King ſhould be prejudiced by the default of an ill Clerk of the Peace; and this is only a Hiſtory, and no Order. Sed Adjornatur to ſearch Preſidents, if after Return, how void ſoever, an Alias may be awarded. (114) Amendment.

Goodman

Siderf. 235. pl. 41. Goodman *against* Cuddrington.

(115) Trials. THE Court granted a new Trial on delivery of Customary Roll, whereby Jurors were induced to give Verdict for the Plaintiff for her Widows Estate; it was done by the Solicitor of the Plaintiff to one Juror that was absent a quarter of an hour from his Fellows, although it were sworn that the Jurors never read or see them, and that the Juror to whom it was delivered, knew not the Contents of it: So the Lord Chandois Case, on deliveryof Depositions by Solicitor to the Jury, that were never read in Court, and it need not be indorced on Postea of Nisi prius; but notwithstanding 3 Cr. 411. pl. 1. the Court here may grant it, this never being given in Evidence

Scurre *against* the Archbishop of York. Ante.

(116) Prohibition. DR. Burrell Commissary affirmed the Course of their Courts, that in matters of Crime it's a sufficient answer that it's so, & non tenetur respondere, if it be objected by the Bishop Ex officio mero; and in case of Defamation, which is Crimen civiliter intentatum, he answers only Quatenus de Jure debet; and his Proctor protests in such case, that as to Matters of Crime his Client should be saved. 2. Also when they proceed Ex officio mero, as on Presentments, they never give Copy of Libel, Moor 755. pl. 1043. nor do absolve him in any Case, but on Oath to obey Mandata Ecclesiæ, to be more obedient to the Kings Laws, and the Commands of his Ordinary: But by Keeling, this is only when they have Jurisdiction of the Cause. 3. Articles are no more a Libel then an Indictment is a Declaration, nor any Oath required, nor Copy delivered, which, per Curiam, they need not more then Copy of Interrogatories are to Witnesses in Chancery, or of Indictment here; therefore, per Curiam, quoad the Copy of Libel no Prohibition. 2. On Suggestion that the Spiritual Court do proceed on Presentment by compelling an Oath, Prohibition may be awarded quoad Swearing, the Ordinary may still proceed in the Cause without Oath.

Dr.

Dr. Watkiſon Official of York.

BErtue prayed a Prohibition quouſque Copy of Libel be delivered, which the Court refuſed without an Affidavit that the party tendred the Fees, and yet they refuſed to deliver it, as is uſed in C. B. (117) Prohibition.

Prior *againſt* Tufts.

IN an Action upon the Caſe for negligent keeping Fire, per quod his Barn was burnt, & diverſa bona was loſt, viz. una Caractat. Pale (with ſign Spades) & certa ornamenta pro Equis, Angl. Furniture, not ſhewing other particulars, which was moved in Arreſt of Judgment, Sed non allocatur: For by Windham, the diverſa bona is ſufficient, Latch. 195. pl. 206. as Trover of Trunk with divers Goods in it, 11 H. 6. 9. pl. 18. & 19. which the Court agreed, the Subſtance being burning the Houſe, and the viz. but an Explanation, in which miſtakes hurt not. Judgment for the Plaintiff. (118) Fuel.

NOta, The Chief Juſtice Hyde ſaid at the Seſſions in the Old Baily, Tueſday Dec. 13. That all the Judges of *England* were of Opinion, that by the Stat. 14 Car. 2. cap. 1. Quakers on the third Conviction muſt be tried the next Seſſions, Aſſize, or Goal Delivery that firſt happen in the ſame County after their Apprehenſion, or elſe not at all: And although ſeveral had been duly Arraigned, and the Jury being divided, no Verdict was given, and they Adjorned into B. R. to anſwer their Miſdemeanor, yet they were all now diſcharged for want of due Proſecution. (119) Tryals.

DE TERMINO Sancti Hillarii,

16 & 17 *Car.* II. *B. R.* Die Lunæ, Jan. 23. Anno 1664.

Hyde *Chief Justice.*
Twisden,
Windham,
Keeling.

Morgan *against* Stapely.

ON Rule that Lessor of the Plaintiff, in Ejectment shall be liable to Costs, the Lease being made by Baron & Feme, on his death she is liable as well as other Jointenant Surviving, per Curiam. (1) Ejectment.

Norton and Adams *against* Thomlynson. Siderf. 236. pl. 1.

JOnes moved to set aside a Latitat being in Action of Debt brought on Judgment for Damages, pendant a Writ of Error on 18 Ed. 4. 7. of Judgment in Action of Covenant, there being a security given, not to complain to any Judge of such practice, but to put in Bail; and in Bendloes Rep. the difference is, when Error is brought then it is ill, but before Error it may: But by Windham and Twisden the practice hath been always so, and resolved in Lymry *against* Langham, Stiles to be good, and the best way to speed the Plaintiffs (2) Error.

tiffs prosecution of his Error. But by Hyde Debt lieth not on Judgment in C. B. after removal, but where the Record is it may be as here, notwithstanding removal by Error into the Exchequer Chamber, for that is but Transcript, and Judgment in this Action cannot be removed by Error. Keeling doubted on Judgment here which is no Record after removal, which the Court agreed as to the suing Execution, but as to putting in Bail or other remedies, the Record is here, and all proceedings after Judgment affirmed, so on Error into the House of Lords, but on Judgment in C. B. is actually removed hither, and Execution here on affirmance, but because of the security not to complain to the Judge, the Court ordered the Officer that took it, to appear. Adjornatur.

Sanford *against* Atkinson.

(3) Peace. NOta, as course of Court, when any are bound over to appear here, and in the mean time to keep the Peace or to be of Good-Behaviour, the Cause is to be expressed in the Recognizance; also when ever the Court bind any Man to the Peace or Good-behaviour, its always for a year.

William *against* Tongue.

Tuesday Jan. 24.

(4) Slander. SYmson prayed a Procedendo into London, on Action there for words, Thou art a Whore, and a Beechlane Whore, which Windham and Keeling granted, as a setled practice.

Siderf. 240. pl. 13. Whitton *against* Preston.

(5) Error. WIld prayed a Supersedeas to a Writ of Error, which was to remove Action of Debt, tam quam on the Statute of Usury, because not within 27 Eliz. 4. to be removed into the Exchequer Chamber, the King being party, and to have a part of the Debt; but in Action de Scandalis Magnatum he is not; yet, as 1 Cr. that is not within the Statute. Jones conceived Error lay, because this is a bare Plea of Debt, and not placitum & contempt. contrà Formam Statuti, and therefore in Debt on 2 Ed. 6. that is tam quam, yet Error lieth, and so Hutt. whereever the Plea is only in placito transgressionis, and the party may be Nonsuit. But, per Curiam it must be Superseded, and the King being here to have

a

a part, he may be said a party. Hyde & Twisden absente.
Adjornatur.

Goldsborough *against* Andrews.

(6) Covenant.

JOnes moved in Arrest of Judgment in an Action of Covenant brought by Assignee of Reversion of a Brewhouse stored, and there being several Covenants in the Lease relating to the House, and leaving of the Goods, Breach is assigned in not leaving the Goods, which is ill, like Lease of Land and Stock, and there being intire damages, all is void. But this Exception arising as well on the Count, as on the Verdict, and the Postea being not retorned, the Court would not proceed thereon, but inclined it was well enough. Adjornatur.

The King *against* the Occupiers of Mycham in Arlington in Sussex.

(7) Way.

LIndley moved in Arrest of Judgment in an Indictment for not Repairing of a way, in that there is no persons named in the Verdict or Indictment, but on the Certiorari certain persons, as such, came in and pleaded, and its found against them, that the way is out of repair; and the Occupiers by reason of Tenure (not saying tenuræ suæ) ought to repair the said Bridge and Way. Keeling doubted, because if one that is no Occupier should as such come in and plead, all is void: But by Hyde and Windham, this shall not be here intended, because they come in as Tenants; also its the common practice to name no persons certain in such Indictments: And per Curiam, till the Bridge be repaired they will not hear this Exception, nor any other of form, no more then if they had been moved before to quash the Indictment; but an Exception on the meer right and merit of the thing may be heard.
Judgment for the King, Nisi.

The King and Maynard *against* the Inhabitants of St. Brivills.

Wednesday, Jan. 25.

(8) Common.

ISsue after Mony levied by Distringas and brought into Court, was joyned, that the Inhabitants of adjacent Hills had no Common according to their Justification, as appurtenant, &c. Wild the Kings Serjeant for the Plaintiff, prayed amendment of his Replication, that it might be, that the Plaintiff

Plaintiff had improved, leaving sufficient Common, and then would consent that the Defendant should have his Mony again out of Court, which the Court would not allow: And by Keeling, an approvement may be against all Commoners, unless sans number, or in Gross: But by Windham, one cannot improve against his own Grant, though it be to a certain number: The Court ordered according to the former Rule, that the Defendant should carry down the Trial, being in default, in not keeping the Lands from such disturbers, as on Roberies in the Statute of Winchester, and if the Verdict go with him, to take out the Mony, without farther motion, this being but a Trial to satisfie a former Inquest, like Trial in Forcible Entry, where Restitution is given, to be Executed according to Verdict, without moving in Arrest of Judgment.

Dism. Br. 17. Barrington Boucher.

(9) Tyths.

WEston prayed a Prohibition, Suggesting a discharge by the Cestertian Order, in Suit for Tyths, licet he had the Mills in his own hands discharged, which per Curiam, is traversable, the Patentee being only discharged while the Lands are in his own hands, as when in the hands of the Abbot at the dissolution, not their Lessee; and so Nie *against* Thomas, Pl. Com. by Windham, licet debite Electus fuit per majorem numerum; But the Court also conceived there ought to be a positive Averment, that these Lands were in the Abbots hands at the time of the dissolution, and now in his own, else would grant no Prohibition: And its not sufficient, to say the Mills were, unless of which they are parcel.

Beckford *against* Clerke.

(10) Assumpsit. Sidert. 236. pl. 3.

IN Indebitatus on promise at Bellafore in parts beyond Sea, to deliver Goods at London in good order, the Dangers of the Sea excepted. The Defendant said the Bill was Teste Oct. 15. Car. 2. and that Non Assumpsit infrà sex annos before. To which the Plaintiff said, that two years before he sued a Latitat, intending to declare, &c. To which the Defendant rejoyned that at the second continuance, the Plaintiff did declare in Trover, and the Defendant did appear, and the Plaintiff was Nonsuited: To which Jones for the Plaintiff demurred, and now excepted against the Bar, that it ought to be Causa actionis non accrevit infrà sex annos;

and

and not Non Assumpsit, for here the ground of the Action is not on the promise, but on the not delivery. 2. The Defendant said, he appeared at the second continuance, and the Plaintiff declared, and was Nonsuited without prout patet per recordum, and this is contrary to the Record of continuance, and therefore ought to be so aver'd: But as to this, Winnington for the Defendant, held the Replication ill, not concluding prout patet per recordum, on pleading the Latitat, but only generally prosecutus est Breve & Vicecomes non misit Breve, &c. & hoc paratus est verificare: Also by Wild, by the Nonsuit the first Latitat is discontinued, and will not support a new Action. Also as to the first, the Plaintiff ought to have said licet, there were no perils of the Sea, yet the Defendant had not delivered: But per Curiam, Twisden absente, this ought to come on the part of the Defendant, to shew there were perils: Also the promise is incompleat, and refers to the time future, therefore the Plea ought to be quod causa actionis, &c. but the parties agreed to try the merits of the Cause on Non Assumpsit generally.

In Error Br. 186. The King *against* Edmonds.

Thursday, Jan. 26.

(11) Peace.

KEeling moved to quash two Indictments of Battery taken at St. Albans, before the Justices of Peace, and Justices of Goal-Delivery, not distinguishing in which Capacity it was taken; which, by Windham, is but Surplusage; Sed curia contrà: But had it been before Justices of Peace, nec non Justices of Goal delivery, it had been but Surplusage, & cassatur.

Cullen & Andrews *against* Mico.

(12) Assumpsit.

IN Action upon the Case on promise to pay Mony for Freight of Ship: On Not Guilty, the Jury found a Special Verdict, that the Freight outward was to be paid within a Month after notice of six Months Service, and the inward on the Return of the Ship to London; provided that if the Ship miscarry, after her first Port of Lading, and before her last Port of Discharge, then the part-Owners should have for the six Months Freight of the Ship's proceed, so much: And find that Falmouth was the first, and Naples the last; and if any thing be due on the Charter-party, they find the Defendant did assure. Symson for the Plaintiff, The Ship miscarrying

rying after the last Port of Discharge, the Freight is due for the time before. Jones for the Defendant Merchants, That the Covenant is only to pay from the first Port of Lading, after the last of discharge, and the Ship never return'd, but after re-lading homeward, was cast away before she came to any other Port: And this Action being an indebitatus, no other considerations can support the Verdict, but only this Covenant, which the Court agreed: But this is only direction, and the Freight is due from the last Port of Lading, till the casting away; and by the Law of Merchants, where the Ship is lost, before she makes any Port, Wages is not due: But if she unlade, Wages is due to such Port, though she be after cast away.

Bean *against* Newberry. Ante.

(13) Arbitrement. KEeling agréed the Case of Cater *against* . . . . 1649. Stiles 217. that Arbitrement to assure as Counsel shall advise, is good, this being but the manner of a Fact prescribed. 2. Also the Award of the Umpire shall be intended of the same nature, as the first submission; and need not any particular, Ita quod it be de & super præmissis, but the Rule in the first is that which must guide the Umpire. 3. An Award of Action between one on the one part, and one of the other, where there are more parties, is not reciprocal. Wild conceived that such Award, touching the premises, relates to the first Submission, and amounts to a so as: Also the Mother was bound on behalf of her Son, and the Son is to have benefit by Bills of Exchange, and discharge of his Apprenticeship, and so the Award is good as to that, if it were so to the other. Twisden agréed the Ita quod governs the whole Submission, as well to the Umpire as the Arbitrators, and there is nothing Awarded to the Defendant, as in Case of Clement *against* Batch, all must have some benefit by the Award. Hyde accordingly; the Umpire is bound, as well as the Arbitrators, to Award de & super præmissis, Sed Adjornatur. Also, by Keeling, Award to enter Bond to pay Mony, is good, being a present end of difference; but not so when its to perform future contingents: But Windham doubted, Obligation to pay such Mony yearly as arise out of my Manor, is good enough.

Beckford

Beckford *againſt* Clerk. Ante.

ON Agreement to plead generally Non Aſſumpſit, Wild prayed Rule by conſent (the Law being doubtful) to give the perills of the Sea in Evidence, the Court conceived elſe it ought to be pleaded ſpecially, that the Goods periſhed by the Dangers of the Sea: But Non Aſſumpſit is ſufficient on a promiſe in Law. But by Twiſden, if it be a ſpecial promiſe, a Releaſe made before the Action brought, cannot be given in Evidence, but by conſent of parties, it was ordered that as the Jury find there was Dangers, or not, ſo the Judgment ſhould be: But conſent of parties cannot alter the Law. (14) Proof.

The *againſt* Patricke. Ante.

Saturday, Jan. 28.

RAymond waived the Exception to the form of Return, F. N. B. 51. that the Biſhop of Ely is Viſitor, therefore not within the Juriſdiction of this Court; for there may be a concurrent Juriſdiction; 1. In the whole Record it appears, the Defendant is injured his due Election, being not denied, nor any refuſal Return'd. 2. The Letters Patents being not reſtrictive to the Vice-chancellor, is nothing pertinent to the queſtion, 3. Every Eleemoſinary Foundation is not of Ordinary Viſitation; 8 Aſſ. 31. 6 H. 7. 14. pl. 2. unleſs there be Inſtitution and Induction, nor then of Grammer School; Regiſter 35. or fol. 41. of Hoſpitals, 2 H. 5. cap. 1. had been to no purpoſe, had the Ordinary power over all Eleemoſinary Foundations, 10 Co. 31. as well ſpiritual as lay, Linwood 53. Spiritual are ſuch as have no mixture of Laity; and this Colledge is of Lay Foundation, therefore the Biſhop of Ely hath no power, for the end is ad ſtudendum, which is principally of Humane Learning, Cambd. 351. and ſo hath the continual practice thereof been; Stow 450. and Linwood cap. de Magiſtris & cap. de Hæreticis 151 & 160. they are diſtinct from Religious Houſes, whoſe end was never ad ſtudendum, but to pray pro Anima, or obſerve certain Rules made to their hands; they celebrated only, but intended no worſhip. 2. Ad orandum, which had been alſo implied, 1 Inſt. Linwood de mortali peccato, and is to be intended only of ſuch praying, which refer eſpecially to Divine or Spiritual matters, Pits *againſt* James, Hub. (15) Mandamus.

the Foundation is denominated a majori. 2. Reason, from the use of these Colledges, 8 Ass. 29. they are not chargeable with subsidies, as Colledges are; also they send Burgesses to Parliament, which they could not do were they Spiritual: Also they constantly apply to the Temporal power on all Grievances, Linwood cap. de Magistris 155. Reyly 533. and bawking the Bishop of the Diocess, Reyly 534. & eadem est ratio totius ac partis, 2 Inst. 640. (which Hyde would have called Lord Cooks Comment only on Magna Charta, as the first on Littleton) Reyly 601. and in Wolvertons Case 50 Ed. 3. pars. 2. Membrana 8. a Mandamus to restore a Fellow of a Colledge; So Hutt. tit. Corody: It shall be intended the King hath Jurisdiction, unless the contrary appear: Also in several Commissions to Visit, the Bishop of Ely had been left out: Also its doubted whither appropriation may be to a Lay-Corps or Colledge, 34 H. 6. 14. b. pl. 27. F. N. B. 38. and Holts Case F. N. B. 47 H. 51. b. 1 Inst. 96. b. Also this is but a Temporal Act to admit a Clerk, for which, as Induction, Action may lye against the Ordinary: Presidents are of so much Authority as they are of Reason, and Justice, Hub. 270. Mic. 1652. a Mandamus was granted to swear a Scavenger to the Inhabitants of Clerkenwell, which is the meanest Office: Also this Remedy doth not determine the right, but the due Election may be tried by Assize; in Order to which, he prayed this Writ. Baldwin pro Rege, That a Colledge is a Spiritual Corps, on the Return all the persons first named being Clericos, and every Fellow within two years Master of Art, must take Orders, unless majority of Fellows indulge him longer. 2. The end of Colledges is to advance Learning, which 11 H. 4. 47. by Thirning, is a thing Spiritual, although as Seld. Hist. of Tyths 121. the members may be Lay, as the Hospitallers and Templers; so Lindwood 118. Cap. de Relig. domibus. Also they are govern'd by Visitors, according to the Ecclesiastick Laws, and their Elections and Controversies so regulated as other Spiritual Corporations are: And of Common Right, the Bishop is Visitor, and things Ecclesiastick may be annexed thereto, 6 H. 7. 13. 10 H. 7. 19. 11 H. 7. 26. as a Free Chappel; So Caudryes Case 5 Co. 10. Quare Impedit 19, before the Statute of Dissolution of Monasteries, so in Ed. the Thirds time, Parsonage of Tillingham in Lincolnshire to Oryell Colledge, and Dyer 255, Clerks Case. 3. This Court cannot intermeddle by Mandamus with Colledges, Spelmans Glossary verbo Visitor, such are as exclusive of all others in Jurisdiction of Spiritual Courts, as this Court is of Lay: And here the Return specifieth Dr.

Gillingham

Gillingham to be Visitor, as Vice-chancellor, to whom no Application was made, therefore as Kens Case, on Deprivation of Parson, no Mandamus lieth, there being other proper remedies, Allen *against* Ash 13 Car. 1. Huntlyes Case in Ejectment; Deprivation by H. Commissioner did not disable him to have Ejectment; but had it been by the Ordinary the Court would not have medled therewith; also it would be inconvenient Fellows should attend here on every small Breach of private Statutes of the House, and its also against the Dignity of this Court, and this Court never hath intermedled herein before, Dyer 376. for this reason no Error lieth out of Cinque Ports; Also Crafords Case, a Mandamus was denied for a Schoolmaster, especially if the Bishop do not approve him, by the Statute 3 Jac. Also in that all Justice is in the King, he may distribute it as he pleaseth, to Special Visitor or otherwise; and at the utmost, the party must come hither at the Darrein Resort, as F. N. B. Error.

Adjornatur.

The Duke of Norfolk and Johnson *against* Smyth.

(16) In Action of Debt tam quam on the Statute of 1 Jac. cap. 22. for cutting Oaks unseasonably; On Not guilty pleaded, and Verdict for the Plaintiff, Dalby excepted in Arrest of Judgment; 1. That the Distringas is Cote, and the person sworn is Coote, which as Maar and Moor, is not the same person; so of Adderby and Adderly, Sed Non Allocatur. 2. The Jury find the value of each Tree 6 s. 8 d. but do not cast up the Sum: Sed, per Curiam, in this Issue its needless; but had the Issue been Nil debet, they must cast it up, and not leave it to the Court. Also 3. The King being to have share of the penalty, no Writ of Error lieth in this Action tam quam into the Exchequer Chamber. Judgment for the Plaintiff, and the Error Superseded. Woods.

Linch *against* D'Amore. Ante.

Tuesday, Jan. 31.

(17) In an Information against Bovy, Rivet, Lambert and Tirry, for Conspiracy, coming before Judge Keeling, and falsly affirming that no prosecution was had within three Terms, whereby the Prisoner was discharged of an Action of 3000 l. on Bond; and in Evidence to the Jury it was urged, that Committitur was not proved by the Record in Court, Action upon the Case Br. 150. In Escape Br. 37. Siderf. 237. pl. 5.

which being only an Action, is needless, but the Entry in the Marshals Book is sufficient; but in Execution it must be proved how the party became a Prisoner, which the Court agreed. 2. The Plaintiff was stopt by Injunction three Terms, and thereby came the deceit; but per Curiam, a Declaration being filed, there can be no Certificate of Non-prosecution, but may Nonsuit the Plaintiff by Trial by Proviso; but they searched only from the time of the Supersedeas obtained, whereas they should have searcht from the first Entry of the Action downward. 3. Per Curiam, This is but in nature of Trespass, and it need not be proved that they assembled or complotted together, but it's sufficient that each acted his part to the same end, and practised any deceit, or consented thereto. 4. This being Information, the party injured by loss of his debt, was allowed to give Evidence, for, per Curiam, he is neither to gain nor lose hereby, nor can have any remedy by Action upon the Case, &c. against any for this deceit: But by Twisden, did any Statute, as 5 Eliz. of Perjury, give the party another remedy by debt, &c. there he could not be allowed as Witness.

3 Cr. 79. 4. c. Action upon the Case, Br. 100.

Palmer *against* Fleshier.

Wednesday, Febr. 1.

(18) Nusance. After Judgment for the Plaintiff in two several Actions for Continuance of Nusance, one on Special Verdict, the other on Demurrer. Per Curiam, contrà Keeling, Coleman prayed the staying of Writ of Enquiry, having found as much damage for the loss of Lights of Shop in the Strand, as the Rent of the whole House cometh to, which the Court conceived outragious, and would have awarded a new Writ: And by Twisden, this way is but in ease of the Court, for they may enquire here, as Yelvert. but only staid the filing.

Siderf. 237. pl. 6. Cornelius *against* Tapor.

(19) Way. IN Trespass for entring a Close in Northfambridge; the Defendant justifies quod Manerium Coldnorton est antiquum Manerium, & quod talis habetur consuetudo infrà Manerium quod quilibet inhabitans haberet viam per & trans the said Close to Ferry: To which the Plaintiff demurred, because the Close appears out of the Manor of Coldnorton, & quilibet inhabitans haberet is no sufficient Averment, which the Court agreed; and it ought to have been, that every Inhabitant within

within the ſaid Manor of C. hath had and uſed way over to N. &c. Judgment for the Plaintiff, Niſi.

Corbitt *againſt* Mercyn. Ante.

Paſch. 16 Car. 2. Rot. 272.

IN an Action upon the Caſe for writing a Letter that the Plaintiff took a Bribe, per quod prædict. (Blank) by a late Statute was amoved, and put from his Office of Surveyor of the Cuſtoms in the Port of Exeter, and all the matter is laid infrà Juriſdict. but not the Office, which Jones aſſigned for Error on Irelands Caſe the Taylor of Bath, Haddon *againſt* Starr, an Attorny of Strutton, brought an Action for words ſpoken in Launceſton, where the Action was brought, which being in relation to his Office, and that not appearing to be within the Juriſdiction, Judgment was for the Defendant: And this Action is not maintainable, but by reaſon of the loſs of the Office, 1 Cr. 570. therefore it muſt ſpecially be averr'd that the Office was infrà Juriſdict. Siderfin for the Defendant in the Writ of Error, prayed affirmance of the Judgment on the reaſon of 1 Cr. 570. Twiſden agreed the difference of Jones, and that here damages ariſe on the loſs of the Office only, and that muſt be inquired of by the value of the Office. Windham remembred the Caſe of Littleboy *againſt* Wright argued by Maynard in the Marſhalſea, That calling Whore infrà Juriſdict. per quod ſhe loſt Marriage, not ſaying where, which was adjudged ill, the words being not actionable. And alſo of Ireland, where the words were actionable alone, to ſay a Taylor ſtole Cloath; and this is a middle way betwæn both; and the Action is as well on the Scandal to his perſon, as Officer, as loſs of his Office, and therefore actionable. Keeling accordingly; and that the words are actionable at Common Law, to ſay of an Officer He takes Bribes: But by Hyde and Twiſden, then the Action muſt be brought in the proper Court in B. R. but this Action is ſpecially founded on the Statute; but per Curiam, the prædict. with a Blank is incurable. (20) Slander.

Baker

Baker *against* Berisford. Ante.

(21) Administrator. IN an Action of Covenant by the Plaintiff, as Administrator of John the Lessor, who was Administrator to Abraham Baker the first Intestate, specially averring that John had paid 750l. which was more then the value of the tearm, and in lieu thereof he accepted it, and so entitles himself to the property: To which Winnington for the Defendant demurred, because it's not said that the Mony was the Administrators own. 2. The Breach is aver'd in not repairing, nor delivering up the possession, not shewing the time in certain; and the Administrator here is but as Assignée, who can have damages for his own time only. Jones for the Plaintiff, This must be intended his own, as Indebitatus for Mony paid by A. for B. shall be intended his own. 2. It appears the Mony paid debts after the death of the Intestate, and so not material at what time, whether before or after Administration committed, for this shall relate: Sed per Curiam, the property is altred only from the payment of the Mony: And by Keeling, the Administrator hath two Estates, and therefore the payment generally is ill: But by Hyde, Twisden, and Windham, it being farther said he elected to have the residue of the tearm in satisfaction, it must on the whole be intended he paid his own Mony, especially being but in an Averment, as an adhuc detinet, &c. And this is confessed by the demurrer; but the parties agrée to refer it, or go to Trial.

Watkins *against* Cad.

(22) Courts. IN Trespass, the Defendant justifies by Warrant directed to him in the Court of Roughborough by the Steward there, to Attach the Plaintiff by his Goods within the Hundred, to answer one Anchanow, by virtue whereof he entred the House, and took the Goods, as Bailiff. Jones for the Plaintiff demurred, because it's not shewed what was the Cause, or that the Court had Jurisdiction thereof; which the Court agreed; and that such Court cannot direct a Warrant to a Bayly of Hundred.

Heliar

Heliar *against* Caseborough. Ante.

IN debt against Executors for Rent arrear; after Assignment by the Executor, Stroud on Dyer 14. demurred for the Plaintiff, that the Action lyeth, 10 H. 7. 18. and Overton *against* Sydall in 3 Co. is ill; but in Co. Entr. 122. Poph. 120. it doth agree with our Case, or is not against it. Winnington for the Defendant on Walkers Case, 3 Co. held the Action lay not longer then the Executors have the tearm, for the privity of the Contract is raised then by construction of Law, 3 Cr. 555. out of the Lease, which being departed with, the Executor is not chargeable. Twisden said this doubt was first started, 3 Car. Latch. Ironmonger *against* Nusam, and no Judgment was given in that Case; and Walkers Case hath always been taken for Law. Windham clearly the Action will lye, for the same Contract the Lessee had is in the Executors; and it hath been ruled, that debt lyeth against the Lessee after assignment, and so debt lyeth here on Lease of Lands in another Country, either against Lessee or Executors, but not against Grantee; and the mischief is as great in this Case as in case of Lessee of assignment to a Begger; and thus was the Opinion of Jones; and that the Case of Overton *against* Sydall was often denied for Law, and the Case of Marrow *against* Turpin good Law. Keeling doubted, because by death of the Lessee the personal Contract is gone, and the Executor is in but by Representation. Hyde Chief Justice in Bret *against* Cumberland, and 1 Cr. 188. Covenant, Br. 32. Bachelor, this point hath been ruled. Adjornatur.

(23) Administrators. In Debt, Br. 94. seu 93. Siderf. 240. pl. 12. 2 Cr. 411 pl. 11. In Debt, Br. 1.

Wingrene *against* Wats.

POwis assigned Error on Judgment in Norwich, in an Action upon the Case on Quantum meruit, that the Judgment is Ideo consid. not per Curiam, it was super hoc visis permissis per eandem Curiam ideo consideratum est, which, per Curiam, is Error; for the Consideration may be at the Tavern. Judgment reversi.

(24) Error.

Osborn

Osborn *against* Cawthorns Executors.

(25) Joynder. In Debt, Fitz. 51. Siderf. 238. pl. 7.

IN debt on Obligation entred into by three brought against one, without shewing the other two are dead: After Oyer the Defendant imparls, and demurred generally, which, per Curiam, is ill; and the Plaintiff must shew the others were dead: So on Assumpsit by three, for although three were Obligors, or Obligees, it's all one, and the Title must appear, especially this Action being against Executors of one, which the Court agreed clearly incurable, and not like Whelpdales Case, where this advantage was waved on Non est factum pleaded, Stiles 78. pl. 166. Also the Obligation being Obligamus nos, it shall not be intended the others did not seal, but if they had not, the Count should have been on writing by three, whereof two did not seal. Judgment for the Plaintiff, Nisi.

45 Ed. 3. 4. b. pl. 9. per Belknam.

Hoyland *against* Bacon.

(26) Court Baron.

IN Trespass, the Defendant as Bayly justifies by Warrant in Court Baron on Recovery in Assumpsit, not shewing the Cause thereof to arise within the Jurisdiction of the Court, for which Cause the Plaintiff demurred, and per Curiam, its ill; so to say in such inferiour Actions, that taliter processum fuit till the Defendant had Judgment and Execution.

Judgment for the Plaintiff.

Sheriff of Canterbury.

Friday, Febr. 3.

(27) Franchise. 52 H. 3. cap. 14.

ON Venire facias directed to him, quod de Ballivo suo, &c. he Returns all Citizens, and the Charter and Writ of Allowance, which the Court conceived ill, in that the Charter is, that for Felonies and Murders, and all except Treason, they shall not be drawn out: But, per Curiam, 22 Ed. 3. 20. there ought to be special words, licet tanget nos. Also there are others beside Citizens there inhabiting; also it ought to be Returned there are no other but Citizens within his Bailiwick. But by Jones, this cannot be Returned on the Venire facias as in London, because they know not; but it may be by Nisi prius there, or by Distringas here: But Twisden contrà, for the parties may appear on Venire facias. Also if an Ejectment be

be brought here of Lands in Canterbury, the Trial ought to be here. Adjornatur.

Sherwoods Case.

For forging the Chief Justices hand to Common Bail, and taking Fées thereof, as Attorny, being only a Clerk, the Court adjudged him to pay a Fine of 20 l. to come with Papers to every Court with his Confession, to stand in the Pillory here from Ten to Twelve, and in London two hours, and in the Marshalsea an hour, three Months Imprisonment, and Good-behaviour for a year. (28) Forgery.

Sir John Jacksons Case. Ante.

He was commited on Conviction of Subornation of Perjury, and during a Month of Commitment, no Actions can be laid without leave of the Court; so while he is in Execution for the Fine: But if commited till Sureties found, none can charge him, else they may after the Month, though it be Awarded, that he after find Sureties. Also per Curiam, Fines assest in Court shall not be estreated in the Exchequer, but levied by process hence. 2. He being return'd by Habeas Corpus ad Conservand. diem only out of the Fléet, the Court could not commit him to the Marshal for his Fine, but ordered a new Writ returnable with the Causes. (29) Perjury.

In Continuance Br. 3. Boys *against* Nortclif.

Jones assigned for Error in Ejectment, that the Plaintiff after Verdict, and before day in Bank, entred forcibly into the Land, the Writ being hereby absolutely abated, as by death, &c. there being no time to plead it in the Court; and the Judgment quod recuperet terminum is hereby frustrated. Weston for the Defendant, This doth only make the Writ abatable, because 4 H. 6. 27. the Plaintiff may maintain his Writ, 34 H. 6. 9. 5 H. 7. 9. 18 Ed. 4. 19. 2 Cr. 303. Carsy *against* Lovell, that the Defendant reentred before Judgment, which Windham agreed, and that by death the Writ is actually abated, but entry must be pleaded puis Dar. continuans in abatement only. Hyde & Twisden did doubt the Plea, being in Ejectment, because it hath been adjudged in the Exchequer, that reentry will not revive the Term: But Keeling accorded with Windham. Adjornatur 850. pl. 52. (30) Abatement. 7 H. 6. 14. pl. 22. In default. Br. 33. 20 H. 8. 3. b. pl. 3 Cr. 767. Brief Br. 1. 3 H. 6. 33. b. Double Plee Br. 44. 2 Leond. 61. Bridgm. 56. pl. 24. 49 Ed. 3. 23. b. 35 H. 6. 13. Disseisor Br. 1. Discent. Br. 46.

Clapham *against* Moyl.

(31) Assumpsit. ON Marriage agreed on between the Defendant, and one Mary Ingram, 1500 l. was by Articles to be paid at several days to the Plaintiff, and he to convey several Lands, and an Office to the Defendant, proviso that the Defendant, out of the first three years profits, should pay 500 l. to the Plaintiff: And now the Plaintiff brings Debt on this proviso, averring profits above the value received, and that the Marriage took effect: To which the Defendant demurred, because this proviso is in nature of a Defesance or Condition: But the Court inclined it was only a Covenant, and Debt lieth, and this being by way of purchase, is well enough.

Waddington *against* Stones.

(32) Lieu. IN Indebitatus for a House sold, not shewing where, which Lyndly assigned on Hill *against* Price, Mich. 16. Car. 2. for Error, and Judgment Reverst per Curiam, præter Windham, being out of Inferior Court.

Starkie.

(33) Priviledge. THe Court discharged him, being committed by the Quéens Vice-Chamberlain to a Messenger of hers; for Arresting her Servant; and per Curiam, such have no priviledge, more then a Servant of Quéen Dowager, but only the Kings Servants, and Parliament Men.

Vide infra 877

Livermoor *against* . . . . .

Saturday, Febr. 4.

(34) Executors. THe Court, ex motione Wild, conceived 9 Ed. 3. cap. 3. that the Executors or Administrators that come first by Distress shall answer, extends not to a Latitat.

King

The King *against* Lambert, Terry and Rivet. Ante.

BOvy being acquitted, and the others found Guilty, the Court ordered all three to come to the Bar with Papers, and Lambert turnd out of the Roll, and Rivet Clerk of the Papers to the Marshal, nor Lambert to be implied again in the Marshalsea, to pay 100 Marks a piece, and be imprisoned for a Month, because they would not discover who imployed them in the cheat of delivering the Prisoner on Common Bail. (35) Escape. Siderf. 237.

Selby *against* Walker. Ante.

Tr. 16 Car. 2. Rot. 185.

IN Action of Covenant, which was super requisitionem of the Plaintiff, and J. S. vel alterius eorum agentibus, to make an account; and the Breach assigned by the Plaintiff, that no account was made, licet the Plaintiff did request alone: To which the Defendant demurred. And Coleman for the Plaintiff conceived, that in regard either of their Agents may demand, it shall be intended that more power is in the party himself. 2. It appears on the Commission of Bankrupts, that the Debts were several, and each to have his several proportion, super similem demand. and neither can demand the others part, and so it could not be joynt, as 5 Co. 8. a. Windhams Case, but must ensue the interest. 3. The Covenant is not between S. and W. but between the Commissioners and W. and there was a Bond by W. to perform so much as concernd S. who was a distinct Creditor, and therefore S. being no party, verba non fortius accipiuntur against him. Weston for the Defendant, The interest is in the Commissioners, and the Defendants no otherways bound to account with the Plaintiff, but by the Covenant, which being joynt there is no prejudice by one to the other: Also the Appointment being insufficient, the refusal may be well enough. 2. The request was laid in Warda de Ch. & quod ad eundem diem & locum appunctuavit, time and place to take the account, Hut. 73. Bendloes 162. which being Collateral is not sufficient, although the Plaintiff must be some where when he requested, yet he might be walking too and fro in that Ward, and therefore this is too General. Keeling conceived the Covenant several, according to the Interest and Subject Matter, and each of the Creditors may severally call the party to ac- (36) Covenant.

count, but he doubted most on the Covenant by the Defendant and his Brother, which was severally to do their endeavours to bring in the debts, & super requisitionem eis factam, they would account, and therefore both are bound to account joyntly, notwithstanding Bond given by one. 3. The appointment ad eundem diem & locum is ill, for the time must appear reasonable, as after Verdict it may be intended. Windham, being in debt on Bond, aided it as much as may be, but held this ill, the Plaintiff being no party to the Covenants, nor Hodgson, and not like 5 Co. 8. being only nominal, as Lease to A. for Lives of B. C. and D. the death of any one determines the Lease, being collateral persons, not parties to the Deed, it shall be intended joynt, but Lease to three shall survive. 2. The appointment ought to be by both, and in a place more certain then the former request, which is but for the Visne, but this for a Fact to be done, but would have all amended: Twisden accordingly, and that the Defendant having pleaded performance, general Issue might have been thereon, and Rejoynder by Non-requisivit had been a departure: Hyde accordingly; and that if parties will not agree to try the right, the Court seeing this but a slip, may give leave to the Plaintiff to discontinue Judgment for the Defendant. Curia advisare vult.

Harris *against* Willis.

(37) Encumbent. Siderf. 239. pl. 9.

ERror of a Judgment in C. B. on a Special Verdict in Ejectment on the Lease of Kettleby, who was instituted to this Living, and they find the Act 12 Car. 2. cap. 17. of Ministers, and the Proviso that nothing therein should prejudice the Title of the Kings Presentee under the Great Seal, within certain time on which the doubt ariseth; the Defendant is found in possession, and the Conclusion is, if Dr. Ketleby was presented according to the Proviso, they find for the Plaintiff, &c. And the Presentation was within that time, but the Execution of it by Institution was after that time, and so being incompleat, the intent of the Act is not fulfill'd, though the words be; for the Act gives no Title, but enables them to enjoy according to present possession: Keeling contrà, That had the Presentee of the King died within the time, he may present de novo, for thereby it was never intended such person confirmed; and so had there been no Institution, the Title had been good against the Defendant: Windham accordingly; and wondred how this became a Special Verdict, he being clear at the Trial, that the Judgment ought to be affirmed, and so it was, Nisi.

Clerke

Clerke *against* Molineux.

IN an Action upon the Case on Escape on mean Process, the Defendant justifieth by Writ Teste Marquess of Newcastle, retornable at Sessions, which recites priviledge of all going to and coming from Sessions: To which Jones demurred generally, because an Inferiour Court cannot discharge any person arrested by a Superior: Also it's ill pleaded, not shewing where the Writ issued, nor where the Sessions was, nor whether the discharge were in Sessions. Wild the Kings Serjeant, This is by Common Law, that persons going to any of the Kings Courts should be privileged: Also it's said, the Defendant received the Kings Writ de habend. Corp. &c. by virtue of which he brought the person to the same day and place in the Writ, which must be intended the Sessions. Keeling conceived it a new Case, that inferiour and limited Jurisdiction should discharge a Prisoner; for though they might punish the Contempt, yet not discharge: Also per Curiam, the Sessions cannot make such Habeas Corpus. (38) Escape. Siderf. 269 pl. 22.

Adjornatur.

Gill *against* William Co-executor of Duhurst, Executor of J. S.

SYmson prayed a Prohibition, because the Suit in Spiritual Court was against the Executor of an Executor when another Executor survived, which being for a Legacy, Twisden and Windham refused; But by Keeling, it ought to be granted, the Legacy not being denied, but a wrong party sued. (39) Prohibition.

Adjornatur.

Clee *against* Scot.

Monday, Febr. 6.

NOta per Curiam as the course of the Court, That a Declaration delivered to a Prisoner in Custodia, must be the same Term filed, and cannot be delivered as of former Term in Vacation time, but Copy may: But if the party be not in the Prison, Process must be against him, unless he voluntarily appear, and so it may be as of former Term, as well as in other Cases. (40) Priviledge.

Pierce

Pierce *against* Parks.

Trin. 16 Car. 2. Rot. 1768.

(41) Administrator. IN debt for Rent (due to the Intestates Lessor) as Administrator, committed by the Bishop of Bristow. The Defendant said, That in Suit between one Anne, Sister of the Intestate, and the now Plaintiff, the same Bishop repealed that Administration, and committed it to the Defendant. The Plaintiff replyeth, That at the time of the first Administration he was natural Brother to the Intestate, and so his power being executed, he cannot repeal it, and that there is an Appeal pendant thereof, which, by Hyde and by Windham, the others being absent, on demurrer of the Defendant, is double: Also the Ordinary may repeal Administration if committed improvidè to Fool or Lunatick: So by Windham, if there after appear an Universal Legatée. Sed Adjornatur, 854. pl. 50.

Withers *against* Wodden.

(42) Error. WInnington assigned Error of Judgment in Marlborough in a Court there held secundum consuetudinem of the said Borough, and doth not say Time out of mind used, which in such Courts is necessary; contrà in Superiour Courts. Also it's not said, That Marlborough is an ancient Borough time out of mind. Judgment Reverst, Nisi.

Roberts *against* Sir John Lenthall.

(43) Officer. HYde Chief Justice said the Court could not Sequester the Marshals Office for not paying debt due to any private man: But by Windham, an Information may be against the Officer for this ill using his Office to shift mens debts, and on that the Court may Sequester; so on any Contempt by him; else, by Hyde, it was never done in fact, nor can be. Ex motione Powis for Sequestration.

Maynell

Maynell *against* Saltmarsh.

IN Action upon the Case Vi & Armis for erecting Posts in the Highway of North-Killington, which leads to Fothorn-ton-Street (per quod the Plaintiff having Close in another Hill, Bowland in Thrisk, and used that thence maxima propinque Via, to be over the said High-way) which so stopt the way, that his Corn in his Close was Corrupted and spoil'd: After Judgment in C. B. Stroud assigned for Error, that this Action lieth not, especially Vi & Armis, it being reasonably to be intended there was other ways. Jones agreed, that if I have ten several private ways, the stopping any is sufficient, with sufficient Damages; but this being a Nusance in the High-Way, there ought to be an Indictment. Hyde and Windam, Being after Verdict, the Court will not intend any other way; also this is a sufficient special Damage, and not like Williams Case Also by Windham in the West Country, in Action upon the Case for digging a Pit in the High-Way, per quod J. S. for whose Life the Plaintiff had Lease, fell therein, and was drowned, it was doubtful if this Action lay; but doubtless ours is a more immediate Damage. 2. There was a default at Nisi prius, and thereon a Tales was Awarded in C. B. which is the usual Course, on remanent of Juror, or when any are withdrawn. Judgment Affirmed. (44) Way.

Golding *against* Goteer.

IN Action upon the Case for misusing his Horse, and Assumpsit for not paying 10 s. Hire, which requiring several Issues cannot be answered by Notguilty or Non Assumpsit. Winnington assigned that for Error, the one sounding in tort, the other in Breach of promise only; also this may Survive in Case of two Plaintiffs, contrà of the other; so Flowerdew *against* Kellet, Hill. 10. Car. 1. Rot. 54. for Bills in this Court as to the Count ensue the nature of Originalls in C. B. for which reason debt on Contract and Trover was reversed, Mich. 14. Car. B. R. Denton *against* Coxe. So Wait *against* Sanders, in C. B. Debt on Contract for Ship, and Action upon the Case for misusing. Adjornatur. (45) Joynder.

Linch

Arbitrement Br. 19. Linch *against* Dacy.

(46) Slander. IN Action upon the Case for calling the Plaintiff Traytor, the Defendant pleads a Submission and Award made, which being for payment of Mony, and the time past: Jones for the Plaintiff demurred, because performance should have been pleaded, being made in ease of the Defendant; and although the Action for words be entred, in Pasch. 15. Car. 2. which is before the Mony is to be paid, which was in June after; yet the Action being suspended, unless the time be not past, at the time of the Plea, performance must be pleaded, which the Court agreed; But the Plea being entred, as Cras. Trin. the Term before the time of payment, it was held a good Plea. Adjornatur.

Twisleton *against* Travers. Ante.

Tr. 16. Car. 2. Rot. 1033.

(47) Arbitrement. IN Debt on Obligation, Condition to submit to the Award of two, and if they made no Award by such a time, then within the same time to the Umpirage of J. S. or such as he should chuse, they within the same time chuse an Umpire, and after make an Award; to which the Plaintiff demurred, and by Jones their power is determined; This Case being in particular to the Umpirage of J. S. a person certain: Sed Curia contrà; its all one, there being a farther time given for the Umpire; contrà if he had been on their disagreement to make an Award within the same time, as is given to the Arbitrators, as Stiles 306. pl. 664. Adjornatur.

The King *against* Housden.

(48) Trades. CRooke Excepted to an Indictment, on 5 Eliz. cap. 4. against Haberdasher of Hats, for exercising such Trade, having never served Apprentiship: This being not Averr'd a Trade at the time of the Statute, nor contrà pacem, for which exceptions it was quasht; but of a Manual Occupation it need not be so averr'd, as making Arras Hangings, which is a new Trade, yet none may exercise it unless Apprentices, But by Crooke, Pillener hath been adjudged not within the Statute of 5.

The

The King *against* Ring. Ante.

Tuesday, Febr. 7.

WInnington waived the first Error, That Bargain and Sale is good, though never acknowledged, so the Deed be delivered and enrolled: But secondly, insisted that there was no Enrolment, 2 Inst. 672. which is essential to the Bargain and Sale within the Statute of 27 H. 8. and to make it a Forgery, within 5 Eliz. on Bellingham *against* Alsops Case nothing passeth until Enrolment, and therefore Yelverton 213. 2 Cr. 291. it must appear certainly in pleading, or Indictment, in what Court it was Enrolled; Its true, that if any Deed or Writing were Sealed, Ea intentione to deceive, its within 5 Eliz. But then it must be called by apt words, quoddam script. purporting a Bargain and Sale, and not a Bargain and Sale. 3. Its said that he forged Bargain and Sale, whereby Henry and HarrisonKeimer did grant, &c. and it doth not appear that ever any more then one of them seald; for unless it be a Deed Sealed, a Court-Roll, or Customary or Will is not sufficient, & expressio unius est exclusio alterius, and it cannot be intended the other ever sealed. 4. The Conclusion, that he published it as the Deed of both, cannot be against the form of the Statute, and the saying ad damnum ipsorum is ill: Windham conceived the Deed effectual to pass an Estate at Will without Enrolment, which is within 5 Eliz. and that as a Bargain and Sale, contrà By Twisden: Hyde said the Enrolment being before the Keepers of the Liberty, is of sufficient certainty in Chancery. And the Court doubted not much on that; its said the Seal only of one, because one might really Seal, or the Deed be the Deed of both, notwithstanding only one Sealed; so if the Jury find only one Sealed, or find one accessory to one only on Indictment, as accessory to two; and by Windham one Indicted of Felony, for taking Mony of J. S. and its found he cheated J. S. with false Dice, the party had Judgment of the Pillory. But, by Wild, this is without president; Also if the matter of the Indictment may stand together, it being found by General Verdict he is Guilty, it shall be aided. Adjornatur. (49) Forgery.

The King *against* Pritchard.

(50) Force. WInnington prayed restitution, on quashing an Indictment of forcible Entry, having by direction of the Court an Affidavit, that he was turned out of possession, for else it may be intended, he is still in possession: Also this was intended on Enquest, on View of two Justices, but being done by Order of Sessions, By Hyde, that Order ought to be brought hither, being not repealable but by another Order of Sessions, and yet such Orders are not removable by Certiorari. Adjor natur.

Siderf. 239. pl. 10. Collingwood *against* Pace. Ante.

(51) Trials. FInch prayed a Trial at Bar, in Action for mean profits, which the Court denied, because how good a Title soever the Defendant have, he cannot give in Evidence any other matter then what was before Ruled: But by Twisden the Title being admitted, other matter may be given in Evidence, as a Release or Fine, after Recovery levied by the Plaintiff, &c. And the same Law is in Action by the Lessor, in the former Action as by the Lessée, and against the Under-Tenants, or any that claim under the former Defendants Title especially, the Contest being for profits during the time of the former Action pendant. Also by Hyde, against estrangers not parties to the former Suit, its most proper for the Lessor to bring the Action.

In Continuance Br. 3. Boys *against* Norclif. Ante 841. pl. 30.

(52) Abatement. WIndham held it but a Plea in Abatement, and no Error; Lord Shrewsburyes Case, 1 Boulstr. 5. which the Court agreed, Keeling absente, as in Case of Barecock *against* Thomson, 2 Nichils in Scire Facias amount to a Scire Feci, and Judgment is then well given, notwithstanding Release before, if it be not pleaded; also 22 Ed. 4. is express. Judgment Affirmed.

Snow

Snow *against* Cutler and Stanly. Ante.

Trin. 15 Car. 2. Rot. 1704.

IN Ejectment of Lands in Hackney; As to moiety, Verdict is for the Defendant; as to the other, a Special Verdict, That if a Devise by Robert Jaacob was good, they find for the Plaintiff. Monday for the Defendant held the devise good. 1. The Devisor was seized by Surrender by him and his wife, to the use of them and the Heirs of Robert, so he was Tenant in Fee, and the Heirs no Purchasers, 1 Inst. 22. b. 319. 376. And 2. this Surrender by Robert to the use of his last Will, which by devise passeth the Reversion, and the Estate of the wife for Life doth not hinder or suspend it, F. N. B. 199. 3. As to the person that is to take, there is none, it being no Executory devise, however it's barr'd by the Common Recovery, though it be Copyhold. Twisden held the chief point, what passeth by the devise, whether a Remainder to William Cholmly, Lessor of the Plaintiff, which is dock by the Recovery, although a Forfeiture. Windham held devise to Infant in ventre sa mere much different, he being a person in esse; but this Heir is in Contingency, and not so like to an Executory devise: Also by Hyde, this devise is like the Case of Collingwood *against* Pace, which was adjudged void. Also by Twisden, he in Remainder is not vouched, and so not to be barr'd by the Recovery: All doubted the devise was void, and the devise to Infant in ventre sa mere, hath been a wavering point in all Ages, Adjornatur. (53) Estate. Devise, Pr. 1.

Wilkinson *against* Boulton.

IN an Action of false Imprisonment and Assault, the Defendant pleaded Custom of London of Orphans Court, which by Custom may dispose of Female Orphans, That one Pain died, and his daughter committed to the Defendant, and that that Court, if the Orphan be taken away, hath power to commit the party to Prison till discharged by due Course of Law, or discover where the person taken is; that the Plaintiff took away the said Pain, and the Defendant by Order of the Court took and imprisoned him, &c. Adjornatur. (54) London.

The King *against* Davies.

(55) Church.

WIlliams excepted to a Presentment for not coming to Church, being super Sacramentum 12 proborum & legalium hominum, not saying Jurati & Onerati, which, per Curiam, is but a form used since these 30 years. Another Exception was, That unusquisque of them are said of the Age of 16. but it's not said ad tunc at the time of the Presentment. Twisden and Windham would not quash it without pleading, being on the Statute of Conventicles, 14 Car. 2. and had it been on 3 Jac. of Recusancy, it cannot be quasht for such form: But they agreed the Exceptions good.

The King *against* Bucknam. Ante.

Wednesday, Febr. 8.

(56) Pardon. In Coron, Fitzh. 282. (280.)

COleman for the Defendant, That the Pardon de verberatione in Indictamento mentionat. is good, though no such word be in the Indictment, yet is wholly included in the word percussit, and so is but Surplusage, and need not be recited, and it makes no other fact; but the Substance of the Offence is before fully pardoned, which on the Earl of Leicesters Case, Pl. Com. is sufficient. Hyde held the Recital needless, but being made, is ill, there being no such Presentment de verberatione as recited, which is as several steps. 2. The Pardon omitted vulnerationes, but added & omnia Malefacta, which makes it well enough, which Twisden agreed; so by Windham, all being Truth that is recited; & allocatur.

Matthews *against* the Carrier of Tiverton Hopping.

(57) Ways. Siderf. 244. pl. 5.

IN an Action upon the Case against Carrier on negligent Carriage of a Bag of Wooll, and of 50 l. therein, whereby it was lost; and declared on the common Custom of the Realm, That the Defendant was a common Carrier; and in the same Declaration there is an Action of Trover for the same Mony. After Verdict, Coleman excepted in Arrest of Judgment, That it's said the Defendant was a common Carrier 10 Sept. and that the Plaintiff was possest the 6th of Sept. & quod postea, viz. die, anno, & loco ult. mentionat. they were delivered, and after lost, &c. not saying the Defendant was a common Carrier the sixth, in which Case, by Hyde

and

and Windham, he is not chargeable as a common Carrier; contrà by Twisden: And all agreed the Postea being not contrary to the Premisses, the scil. is good, and shall not be taken as Surplusage. Also on supposition he is not chargeable as common Carrier, yet by Jones for the Plaintiff, he is chargeable by the Common Law, there being a trust by delivery and agreement for Many to carry to a certain place, and the recital of one part of the Common Law doth not vitiate, but that the Plaintiff may use any other part of the Common Law, contrà of Statute: Sed per Curiam, Had the Action been on the Special Agreement then joyned with Trover, which is a tort, it's ill: Also the Custom of the Realm ought to be set forth, at least an Averment that he was a common Carrier. Also by Windham, this is but Evidence, and in a Special Action it ought to be positively laid that the Defendant in consideration thereof did assume and promise.

Adjornatur.

The King *against* the Sheriff of Canterbury. Ante.

HArds for the Defendant, held the Return sufficient; And 1. the Exemption is good in point of Grant, 42 Ass. 5. 39 Ed. 3. 15. But 2. the doubt is if the words be sufficient in such Cases where the King is party, which is neither for any Felony, Murder, or other Criminal Causes, except Treason, arising within their City: And on Arraignment of Lad, Reader of Grays-Inn, on 4 Jac. for Murder done there, (26 H. 6.) it was ruled that on the former Charter, 8 H. 6. 21. 21 Ed. 3. 54. 11 Co. 64. because in 4 Jac. there was no such Clause, Coram ipso Rege, and therefore he was tried here by Nisi prius, this Court being not excluded; and thereupon a new Patent was obtained two years after, which would be fruitless, unless this Court be excluded by Addition of the Clause Coram Rege, which is particularly for this purpose, 35 H. 6. 42. Exemption after the Distringas is good enough by special words: Also here are words equivalent to licet tanget nos, 8 H. 6. 19. which is sufficient. 3. This Return could not come in at the Venire facias, (18 H. 8. 5. for it must be returned, and not allowable before Appearance, which is contrary) 27 H. 6. 5. 34 H. 6. 25. 35 H. 6. 42. for the Distringas may be with Nisi prius, and so tried there. 4. An Action upon the Case, Br. 1. 2 Inst. 130. Marlbr. c. 14. lyeth against a Sheriff if he hath a Writ of Allowance, as in our Case; 22 Ed. 3. 20. is that Estranger must pray it on the Distringas; but others, Dy. 357. Stamf. 159. may have it at the Venire facias,

(58) Franchise.

Twisden,

Twisden, This Liberty vests not in the Politick Body, but in the particular persons, 30 Ass. 1. who must come in and pray to be discharged, Moor 833. Waller *against* Hanger, and it cannot come in by Return of the Sheriff; and so are all the Books before cited. 2. Windham held the Franchise sufficient against the King, Dyer 46. & 24 Ed. 3. London, Br. 4. being in all Cases, except Treason, which is the same with London; and that it may be Returned by the Sheriff of Canterbury, although it could not by a Sheriff of another County, 19 H. 6. 52. b. 30 Eliz. per Gawdy, the Exemption at the Venire facias cometh too late; Hyde accorded with Twisden: Mr. Attorny said, Sir Thomas Overburies Case on Indictment for Murder of him, was tried in London by measuring the Bounds: But by Hyde, this was on Special Commission of Oyer and Terminer, and this question never stir'd.

Adjornatur.

Pierce *against* Parks. Ante 846. pl. 41.

(59) Administrator. 2 Roll. 303.

DEbt for Rent due in the Intestates life time; the Defendant pleads Sentence of Revocation of the Plaintiffs Administration in bar. The Plaintiff replyeth that was void, he being Brother, &c. and that there is still an Appeal pendant of the first Sentence: To which the Defendant demurred. Paulet for the Plaintiff, That the Action is maintainable, 1. Because the Revocation is void; for at common Law the Ordinary had only an authority to keep or distribute the Goods, and grant Letters ad Colligendum, Dyer 255. b. 256. but no interest till 31 Ed. 3. cap. 11. to grant Administration to any; and hereby he hath only Commission to grant to the next of Kin capacitated by Law, and then the interest is vested in the Committee; and 21 H. 8. cap. 5. is but an explanation and direction of the former, which being but bare Authority in the Ordinary, and well executed, cannot be repealed; which Rule is as true in publick as private Authorities, and in Judicial as Ministerial Powers, as 5 Co. 40. and Prin's Case on the Act of Corporations, and what Judges do, that is not within their Jurisdiction or Authority, is Coram non Judice, as the Marshalsea is a Court for all Causes, but 9 Co. 76. confined to persons del Hostel, and others, are Coram non Judice there; so the Ordinary is restrained to the next of Kin, and otherways his Commission is void; but not pleadable here, for his Authority remains, and Anderson 303. he may revoke it without any Process; but here his Authority is well executed, and so not revocable without cause,

cauſe, 1 Cr. 62. & 201. as Letters ad Colligendum might be at common Law; and in Betſworths Caſe, 22 Car. 1. this point was obiter reſolved, but he relyed on Sir George Sands's Caſe. I agree, when a Caveat is entred by two in Equali Gradu, 43 Eliz. Lady Willoughbies Caſe, Goldsb. 119. Adminiſtration granted to one may by Appeal be revoked, or where there is ſome diſability by Attainder, which is perpetual, the Ordinary may grant new Adminiſtration; contrà on Excommunication or Utlawry in Treſpaſs, which are but Temporary, for there, as 34 H. 6. 14. he can only grant a concurrent Adminiſtration quouſque the diſability be removed, which are in nature of Servants to the firſt, as Adminiſtration during minority; but in our Caſe there is no cauſe appears. 3. Here the Repeal may be pleaded in bar, in regard the Ordinary hath a general Juriſdiction of the thing, contrà of Coram non Judice. 4. Alſo by the Appeal, the firſt Action is ſtill pendent. Wallop for the Defendant, It muſt be ſuppoſed that the Ordinary hath revoked for Cauſe being ſaid done debito modo; but however, the Ordinaries power is by the common Law, and he might have granted it before the Statutes to any perſon whatever; and what is not taken away ſtill remains in them. Sed Adjornatur.

Pierce *againſt* Parks. Ante.

Thurſday, Febr. 9.

9. Co. IN Henſloe's Caſe, it's ſaid the King of ancient time had the Power of Adminiſtration, and granted it to the Ordinary by Act of Parliament, Seld. Titles of Honour, Second Part, cap. 5. fol. 715. ſince antiquated, as 1 Inſt. 45. b. and therefore Seld. 484. in his Review of Tythes, conjectures that ſuch may be ſaid the common Law, it not appearing now how ſuch Juriſdiction came in. 2. By their Law they might grant Adminiſtration to whom they pleaſed, and revoke at pleaſure, which ſhall not be taken away by general words, 5 Co. Caudries Caſe, without negative, 31 Ed. 3. cap. 11. which is only explained by 21 H. 8. neither of which reſtrain their power of granting Adminiſtrations, but forfeiting 10 l. 1 Leonard. 240. he may ſtill grant to whom he will. 2. Their power of Revocation is not reſtrained, although it do reſtrain their power in Grant, 2 Inſt. 455. in which Caſe being by Common Law, the Acts that reſtrain are Stricti Juris, not extendable beyond the words, which are only, that the Ordinary ſhall depute, in which Caſe, ex natura rei, all (60) Adminiſtrator.

De-

Deputations are revocable, and its not in either said, that the Ordinary shall grant irrevocably; and its reasonable they should have power over their own Acts, so as to review to remedy Surprisals or Error, which being so incident to the nature of the thing, shall not be restrained by a General Construction. 3. There are only three Instances, as Latch. 67. Mayo's Case, where Prohibitions have been denied, as on suppression of Will. 2. Where he that is next of Kin obtains it within fourteen days, which as Dunsters Case, Pasch. 1649. is too hasty, and not according to the Rules of that Law, in which Case Twisden, who moved then for the Prohibition was denied, which Twisden agreed, because they proceeded inverso Ordine: And here our Administration is taken on the fourteenth day, which in their Law is exclusive, not inclusive. 3. Where, Brown *against* Poyns, there is a residuum Bonorum, Dyer 372. pl. 8. so where there is any incapacity in the person, or other default: So 32 H. 8. that enables all persons, doth not include Infants, or Feme Coverts, or such as are disabled by the Common Law, 3 Cr. 163. Anderson is express, that such Administration is revocable, 1 Cr. 62. Fotherbyes Case is only, that they cannot grant at pleasure, as they might at Common Law: So 1 Cr. 146. Levans Case, the Interest of Administrator, 4 H. 7. 14. per Tremain, Adm. Br. 33. is only as a power, and accountable to the Ordinary, not absolute interest; 27 H. 8. 26. b. by Fitzherbert, Adm. 3. Owen 50. Newmans *against* Beaumont, 3 Cr. 460. Anderson 303. Caryes Case, the Ordinary may repeal by new grant, without Sentence of Repeal; and it being their ancient Power and Jurisdiction, and not given by the Statutes, therefore may be executed at several times, being a Power just and reasonable; Judgment for the Defendant. Windham, Upon the Bar held the Case not worth the Argument: But said the Roll Warrants not the Opinion of Cooke, but that if the King had a Debt by Magna Charta he sent a Prerogative Writ to seise the good of the Intestate, to pay his Debt; and doubtless the Auncient Kings divided these Jurisdictions, when all the Land was in their hands; but here the Ordinaries Power cometh not in question: Its true a Mandamus hath been sent to the Bishop, as I have heard, when the next of Kin cometh in, and contests Administration granted to a stranger; but in this Case the Debt must be paid to the new Administrator, and the Debtor being a Stranger, cannot bring this into question; also its in their power to do, and its sufficient to say its done, Concurrentibus hijs quæ in jure requiruntur,

requiruntur, for they have many causes not taken notice of by our Law. Were the Contest, between the two Administrators, it might be doubtful. Twisden, The debito modo revoked is not sufficient, so Betsers Case, Stiles 10. where resolved, that if not rightfully granted, it may be revoked but not where well committed; Also in Trumpings Case, in Latch. 67. and before the Deligates in Betsers Case; Also the Defendant must set forth the special Case, that to the Court it may appear the Ordinary had power to revoke: So debito modo is no good pleading, but the Replication, per Curiam is double; if the Defendant had took advantage of it, Concurrentibus hijs is sufficient, as Specors Case; but there being a special direction by the Statute, it must appear specially. Windham contrà, The matter being properly within their Jurisdiction, as Kens Case, of Deprivation, which is measured by their Law; And the power not given by any particular Statute. But Hyde agreed with Twisden.

Adjornatur.

Bean *against* Newbery. Ante.

(61) Arbitrement.

The Court conceived the Award naught, and Judgment for the Defendant, because the Award to pay to a Stranger is void. Jones prayed leave to discontinue, which the Court refused, because here doth not appear any real Debt; Also the party hath other remedy by Debt on the Award, if it be good.

The King *against* Lucas.

(62) Taxes.

Coleman prayed, the Defendant, being committed by Sessions generally, in pursuance of Act of Parliament, on beating Commissioners of Excise, and bound to appear there before, might be Bailed, the party being only Indicted, and no Fine: Sed per Curiam, that the next Justice, or any other Magistrate may commit, doth include the Sessions, and not only other Magistrates as in Corporation inferior to such Justice. 2. General Commitment is intended as well in Inferior, as Superior Courts, and is intended till next Sessions without express words; and being to remain in Prison, the party is not Bailable.

George and Buce.

(63) Rent. IN Replevin, the Defendant as Bailly made Cognizance for Rent, reserved to J. S. on Dæd of Feoffment made to the Plaintiff, virtute cujus the Plaintiff was seised, to which the Defendant demurred; and Coleman for the Defendant held the pleading, quod per chartam feoffamenti dedit is sufficient here, the Title not depending on the Feoffment but only for Rent: Sed per Curiam, this being by Reservation thereon, if no Feoffment there is no Rent; and unless it be said quod feoffavit, or shew livery was made, The Plaintiff is but Tenant at Will; and so Judgment for the Plaintiff against the Avowant, Nisi.

Symons *against* Purchace, Administrator.

Hill. 15 & 16. Car. 2. Rot. 82.

(64) Administrators. IN Debt for Rent on Lease to Richard Purchace, the Intestate reserved half yearly, the Intestate dyed before Mich. and for Remainder then due, 2 Cr. 411. the Plaintiff hath brought the Action in debet and detinet; to which the Defendant demurred generally, 1 Cr. 63. Smith *against* Norfolke: By Twisden on demurrer, this is a controverted point, but on a Verdict its well enough; and setled 5 Co. Hargraves Case, which Windham held also clear on demurrer for Rent Arrear, in the Administrators or Executors time, the Land being their own; and the same Law is, if the Intestate dye but an hour before the day: But they agreed that it may be in detinet alone, and so it ought to be if the Rent be of the value of the Land. Sed Adjornatur.

In Execution Fitzh. 165. Lord Stanford *against* Hubbard.

Friday, Febr. 10.

(65) Execution. 3 Ed. 1. cap. 24. Register. Jud. 13. 2 Sc. fa. Siderf. 239. pl. 11. Admeasurement Br. 2. Admeasurement 3. Action upon the Case, Br. 81. Extent. Br. 113. 9 Ed. 3. 39. b. MAynard prayed Examination of practice of Sheriff on Elegit, finding the Defendant had Lands in A. where he had nothing, and so extending all his Lands in B. as a Moiety, which being true, no Attaint lieth, nor can be avoided at the Assizes, by Ejectment of Moiety. Windham held an Audita Querela lieth; Twisden said its avoidable by Ejectment, and Evidence may be, that the Defendant had nothing in A. which the Court agreed; and directed Notguilty to be pleaded in Ejectment

Ejectment of Lands in A. or to file the Writ of Elegit, and in Ejectment thereon (which else cannot be brought) to plead the same, but they refuse on Affidavit, to refer the Examination of the Enquest to the Secondary. Execution 86. 134.

Sir Henry Hern *against* Sir William Brownlow.

FInch prayed Costs of former Trial at Bar in Replevin on Issue for son Frank-tenement before the Avowant, against whom it was proceeded in new Ejectment, which Wild the Kings Serjeant opposed, because the matter is suspended by Writ of Error, which the Court agreed, they could not award nor hinder the proceedings, but contrà, if the former Action had been Ejectment, where the right would come in question; Finch prayed an Imparlance till Costs of a former Trial were paid, 17 Car. 1. which the Court refused, but would order that full Costs (i. e. such as the Defendant shall swear expended) shall be paid. (66) Costs.

Ferrers *against* Jaques.

ON Rule to change Venire from London into Warwicke, in Action upon the Case for words, there ought to be, Nisi causa ostensa fuit in contrarium, by a day, and none being, the Plaintiff may come before Plea entred, and suggest, that he will give no Evidence, but where the Action is laid, and so hinder the changing it; but Serjeant Dalison praying it after Plea entred on the Roll, came too late: per Curiam. (67) Visne.

The King *against* Hales, &c.

WIlmot excepted to an Indictment, on 8 H. 6. 9. of Forcible Entry, said Vi & Armis & manu forti, but its not said illicite, which in Jaacobs Case was ruled by Chief Justice, Rolls 82. ought to be; Sed curia contrà; and if it were not illicite, Notguilty may be pleaded to it, but on 15 R. 2. ubi ingressus non datur, it must be so said also. 2. Per Curiam, one Justice may as well make enquiry, as to certifie force on his single View, the Court ordered him to plead. (68) Force.

Greenlye *against* Harper.

Saturday, Febr. 11.

(69) Slander. IN a Libel against the Plaintiff, for calling the Defendant, being a Minister, Drunkard, he by Weston prayed a Prohibition after Sentence of Excommunication, in regard its a Temporal Offence; and the Plaintiff had often seen the Defendant Drunk and admonished him, and after Information against him at Common Law for Drunkenness, whereupon this Libel was conceived: Twisden and Windham granted it, in regard for words only they cannot thus proceed, pro reformatione morum; but by Windam they may deprive him for the offence.

. . . . . *against* Lusamoor.

(70) Trades. SHouldham excepted to an Information by Common Informer for exercising the Trade of a Barber, not saying he set up publickly; Sed non Allocatur, the Statute being in the disjunctive. 2. Its not said contrà pacem; sed per Curiam, that's never done in Suit by Common Informer; and if the Defendant did not set up publickly, he may be found Not guilty.

Clapham *against* Moil. Ante.

(71) Covenant. WIld prayed Judgment might be staid, the point being difficult; and Debt lieth not on these Articles made on Marriage of the Plaintiff with the Mother of the Defendant; for the Agreement is to Convey the Office of Prothonatory of the C. B. Proviso, That the Defendant shall pay 500 l. to the Plaintiff out of the first three years profit, he agreed this Proviso would be a Covenant in the Conveyance, because on default the Office cannot revert to the Plaintiff, nor have any other remedy; but these Articles are only to convey with such Proviso, and therefore Debt lieth not: Twisden and Windham doubted, & Adjornatur.

DE

DE TERMINO Paſchæ,

17 *Car.* II. *B. R.* Die Mercurij, Apr. 12. Anno 1665.

Hyde *Chief Juſtice, he died ſuddenly on* May 1.
Twiſden,
Windham *being ſick, he came not until* Monday, Apr. 17. *and went off ſick on* Friday.
Keeling.

Paget *againſt* **Lowe.**

HE brought a Bill againſt the Defendant on 32 H. 8. cap. 4. & 18 Eliz. cap. 14. for not entring his Warrant of Attorny in the Suit of one Clayton. Coleman prayed that this Statute, being obſolete and never put in uſe, might not be now put in Suit without Rule of Court, in regard all the Clerks of the Court are hereby concerned; as alſo that the Defendant may have time yet to file his Warrant. Twiſden conceived the Reaſon why no Warrants are filed is, becauſe the want thereof is aided after a Verdict, and this is the occaſion of the diſcontinuance of the practiſe, but by Law they ought to file it: But the Court cannot alter the Law, but in pra- (1) Attorny.

prudence may, to prevent Garboyle in the Office, Revive it by Rule, which the Court, Windham absente, agréed; and Keeling understood not how a Statute Law can be obsolete: The Court ordered proceedings to stay till farther Rule, and that all Warrants since the King came in, and in future, be entred, &c.

(2) 2. Hyde Chief Justice ordered the Attorneys at their perils to kéep up the ancient Course of Pleading, notwithstanding the late Act of 17 Car. 2. doth aid Misericordia for Capiatur, &c.

Ward & Uxor *against* Marsh & Uxor.

(3) Slander. Sidert. 241. pl. 2. YOu are a Bawd, and I will prove you a Bawd, and you took 5 s. for a clean pair of Sheets for two Whores and two Rogues. Wild the Kings Serjeant, in Arrest of Judgment, conceived the words not actionable, there being no special Custom alledged, as in London. Jones for the Plaintiff, The word Bawd with this addition is actionable, as punishable in the Léet for the common practice of it, rather then for the place, 1 Cr. 229. is denied in 261. & 329. for though it be out of the House, as 396. it's punishable as well as within. Also it's laid, 2. That the Plaintiff kéeps a Victualling House, 3 Cr. 582. pl. 8. and that hereby she lost her Customers; but the words being spoken of the Feme only, this Exception was disallowed. Also there were other words, That she was a Bawd, and took 5 s. of a man to help him to a Whore; and that she would hire Bayliffs to throw durt at her when Carted. Keeling conceived the word Bawd generally not actionable; but the words in 1 Cr. 396. were actionable, because it could not be otherwise intended, but that she kept a Bawdy-house, and this only is punishable in Léet: The Court doubted these words would not be sufficient. But 3. there being other words, That she was a Bawd, and the Defendant would have her Carted for a Bawd generally, and intire damages given for all, it's ill per Curiam; but had all the words béen laid together, they might have béen actionable. Adjornatur.

Abbot

Abbot, Administrator of Pickas, *against* Leech.

PEr Curiam, the marking the Roll, or paying Fees for a Writ of Error, or Allowance by the Chief Justice, unless it be actually taken out, is no Supersedeas to Execution, but being taken out it is; but the Sheriff is not in Contempt if he have no notice of it, or Supersedeas delivered to him. Also per Curiam, if Administration be repealed after Judgment here obtained, this Court can take no notice of it: But by Twisden, the new Administrator may have an Aud. Querela. Ex motione Serjeant Newdigate to set aside Execution, which the Court granted, if the Secondary reported it was unexecuted when the Writ of Error was taken out. (4) Error.

Morgain *against* Culpeper, &c.

Thursday, Apr. 13.

IN a Trial at Bar it appeared that W. Tenant for Life, Remainder to the first, and so to several Sons in Special Tail, Remainder to eight daughters of T. the Father: W. having no Issue, suffers a Recovery 16 Jac. vouching four of the eight Sisters, who, Per Curiam, as Litt. are Tenants for Life, with several Inheritances, which by Twisden, as to the seven daughters, who were then only alive, this is a defeasible Estate, and the other three may enter, and the Uses of the Recovery was to W. with several contingent Remainders, and he enters generally, which by Mr. Attorny for the Plaintiff, who claimed three parts of these four Sisters, who were vouched by Special Limitation of the new Use to such daughters as were vouched, cannot revest the Right of the other three Sisters, under whom some of the Defendants claimed, in regard that an Use being limited to a Brother of W. on the Recovery, and he suffering another Recovery 18 Jac. vouching the three Sisters, who coming in of all their Estates, do pass all they have, and so bar their Right, and the eldest Brother of W. may limit what Use he please: But by Keeling, the three Sisters having not entred, this Recovery operates in Extinguishment, especially by Hyde Chief Justice, and Keeling, they having but a Right at the time of the Voucher: Also no Use can be limited by the last Recovery by the three Sisters; and the eldest Brother being but Tenant for Life, his Limitation is good but for his Life: But in 24 Car. 1. John the eldest Brother suffered another Recovery to the Lessor (5) Joynder. Siderf. 241. pl. 1.

Leſſor of the Plaintiff, vouching the four Siſters, which doth alſo extinct their Right, and ſo the Leſſor of the Plaintiff hath no Title for want of Entry, by Wild for the Defendant: But by Glyn for the Plaintiff, the Eſtates of the four is not turned to a Right, but confirmed by the ſecond Recovery, which the Court agreed, unleſs the Deed of Uſes be otherwiſe, as was when ſhewed quoad 130 Acres; wherefore as to this the Defendant was found Not guilty, and the Plaintiff recovered the three parts of the four, one of the Siſters of old Thetcher, who had a Remainder by his Settlement, who was the Common Anceſtor.

In Enqueſt, Br. 30.

Friday, Apr. 14.

(6) Enqueſt. EX motione Recordatoris Wild, The Court on Certificate of a Judge, that Verdict was given contrary to Evidence, would not allow the Sheriff ſhould bring in the Book of Freeholders to the Secondary, for the ill Example; but ordered the Sheriff ſhould Return a good Jury in the new Trial. Hyde Chief Juſtice conceived Jurors ought to be fined if they would go againſt the Hare and direction, take Bit in mouth and go headſtrong againſt the Court; and ſaid, That by the Grace of God he would have it tried, ſeeing the Attaint is now fruitleſs.

Enqueſt, Br. 30.

(7) Execution. COleman prayed the Extent might be continued, unleſs the Defendant would pay Principal, Intereſt, and Charges, which Windham oppoſed, becauſe there was ſeveral Charges by reaſon of the Extent; and by Law the Plaintiff can have only the Penalty of the Bond as recovered, 100 l. & 20 s. Sed per Curiam, this is not ſufficient without Scire facias to diſcharge the Extent: But if the Defendant will put the Plaintiff to Charges, it's reaſon he ſhould pay more; but contrà if the Plaintiff unneceſſarily put the Defendant to Charge: But referred to the Secondary.

Abbot,

Abbot, Adminiſtrator of Pickas, *againſt* Leech. Ante.

THe Secondary reported that the Writ of Error was actually taken out, and notice given to the Defendants Attorny, after he had given the Execution to the Sheriff; but before the Sheriff had executed it, Reſtitution awarded: And per Curiam, this being Judgment in Action upon the Caſe by Nihil dicit, it's not neceſſary that the Plaintiff, in the Writ of Error, ſhould put in Special Bail by the late Act Car. 2. cap. But by Hyde Chief Juſtice, he ſhould, had it been by Verdict, though commenced before 24 March, quod quære by the reſt. (8) In Error. Br. 55.

Ratcliff *againſt* Biſhop.

JOnes prayed Judgment in debt on Obligation for not performance of an Award, the Condition was to ſtand to the Award of two de & ſuper præmiſſis, or to the Umpirage of the third. The Defendant pleads no Award: The Plaintiff ſheweth that the two Arbitrators made no Award de & ſuper præmiſſis, but ſaith that the Umpire accepto ſuper ſe onere Umpiragij, did Award that the Defendant ſhould pay, &c. and doth not ſay de & ſuper præmiſſis, for which cauſe the Defendant by Barwell demurs: Sed per Curiam it's well enough, and can be no otherwiſe intended, wherefore Judgment for the Plaintiff. (9) Arbitrement.

Swallow *againſt* Emerſon, Executors of Turner.

IN debt upon a Bond, the Defendant pleaded that there was another Executor not named, and yet living; and doth not ſay that he did Adminiſter: For which Cauſe the Plaintiff demurred upon 9 Co. 40. and for the miſchief of the Creditors, if they ſhould be bound to ſeek out ſuch as never proved the Will; and on the ſame Reaſon, Trin. 16 Car. 2. Rot. 1403. Pettoe *againſt* Ruddock Adminiſtrator of Hanſhaw, ut dicitur, which, per Curiam, is well enough, becauſe the Plaintiff is bound to take notice of no more then is in their Conuſance, Wentworths Executors 146. Executors, Br. 20. & 21. is on this difference. Keeling conceived the conſtant difference to be where Executors bring the Action, all muſt be named; but an Action againſt them may be againſt ſuch only who adminiſter, and unleſs this be averred, the Defendant cannot plead this Plea in Abatement; and per Curiam, this is the conſtant difference. Judgment for the Plaintiff. (10) Joinder. 1 Sider. 242. pl. 3

Mills *against* Middleton.

(11) Marriage. ACtion upon the Case on Promise that if the Plaintiff would marry the Defendant, the Defendant would marry the Plaintiff; and in Action for Non-performance, the Plaintiff saith only, That the Defendant did not marry the Plaintiff; and doth not say she was ready to marry the Defendant, for which cause Bigland moved in Arrest of Judgment, that she might be married before to another: But, per Curiam, this ought to be shewed by the Defendant.

Siderf. 242. pl. 4. Weeks *against* Copleston.

Hill. 16 & 17 Car. 2. Rot. 330.

(12) Assumpsit. IN an Action upon the Case against the Widow of the debtor, in Consideration that the Plaintiff would forbear to disturb until such a day, and not molest her in her Journy to Lond. which by Raymond on demurrer, that this is no Consideration, it not being alledged that she is Executor or Administrator, for which cause it's ill; which the Court agreed, upon the frequent Resolutions in 8 Jac. Hill *against* Baily, on which Hinckton *against* Humes was grounded: So Whitcher *against* Dodes, Consideration to forbear H. as Executor, is ill; so Howard *against* Ducket: But the Record being farther, & quod the Plaintiff abstineret à solutione until a day, and not sue for the same, the Court conceived this, if intended as a general forbearance, is a sufficient Consideration; but they doubted that by this (and) it might be tied up to a forbearance of her only; and so it is by Keeling, Sed Adjornatur. The promise by the Defendant was, That if the Plaintiff would forbear to molest or disturb the Widow Candish, who was in Fact Administrator, but it did not appear on Record.

Cambell *against* Preston.

Saturday, April 15.

(13) Assumpsit. IN Consideration the Plaintiff at the Defendants request would deliver him certain parcels of Tymber, the Defendant would build up two Rooms in such a House, and Repair: After Verdict in Special Action upon the Case for the Plaintiff,

Plaintiff, Raymond moved in Arrest of Judgment, That the Defendant hath time during Life, unless request, and the request is 10 Oct. and the Action is of Michaelmas Term, so there is no convenient time given: Sed per Curiam, the Defendant ought to have pleaded it Specially, or demurred for that Cause, because it's not sufficient.

Judgment for the Plaintiff.

The King *against* Percival and Parker. Ante.

THe Court conceived this Return cannot be made good, and the City in general cannot demand it, nor will any Action lye against the Sheriff upon their delivery of the Writ of Exemption; but such particular Member must have a Writ delivered to the Sheriff, Moor Wallers Case, Also by the Return of the Venire facias, the Jury is admitted as Returned, and therefore the Sheriff cannot, on the Distringas, make a contrary Return: Also upon such Returns there would be a failer of Justice, unless the King will send Special Judges to Canterbury. The Court Awarded an Alias Distringas to be returned Monday fortnight next from Canterbury, in regard the Sheriff cannot vary from the first Venire facias returned, but must have the same men. (14) Franchise. Sidenf. 243. pl. 5.

The King *against* Middleton.

IN an Indictment of Assault and Battery in London, Winington assigned for Error that the Record was all by way of Recital, that Adjornatum fuit such and such a Sessions, which being several Continuances only before the Indictment found, but when the Indictment is found, it's in the Present Tense præsentat' existit, which, per Curiam, is well enough; and the very words of the Record below, quod talis, &c. Sessio adjornat' fuit: So between the finding and the Trial is the recital quod at such a Sessions præceptum fuit Vicecomit' quod non omittas, which, per Curiam, is cured by appearance of the party: Also had the præceptum fuit been at the time of the Trial, it had been ill. Also 2. the Clerk of the Peace ought to mention only the day of the Sessions, and not the Continuances, unless there be Special Cause, as Felony, on another day. Judgment affirmed. (15) Indictment.

The King *against* the approved men of Guilford.

(16) Mandamus. ON Mandamus to restore one Mills an approved man, who Returned that he said of the Mayor, and one Canfield, That Canfield, one of the Magistrates of this Town, is a lying Knave, and the Mayor, &c. shall not father their lyes upon me. For which being convented before the Mayor, and confessing the words, was suspended until he acknowledged his Fault, and made Satisfaction to C. Wild the Kings Serjeant excepted, That here is no power by which they may remove, which, per Curiam, is needless, here being only a Suspension quousque, for which the party, if injured, may have an Action upon the Case: But this Mandamus lyeth not, unless he be totally removed, because the Freehold remains in him, as on putting one of a Society out of Commons. But by Twisden, Suspension is a remotion for the time; and this would open a great Gap for Oppression. Et Adjornatur.

Wilkinson *against* Boulton. Ante.

(17) London. THe Defendant justifies False Imprisonment by Custom of London, That the Court of Orphans is a Court of Record, that have the committing of the Guardship of any such; that by the Custom, if any such be taken away, the Court may, if the party appear in their Court, and it sufficiently appear to the Court that he is Guilty, they may Imprison him till he discover whither the Orphan is carried, where he is, or be discharged by due Course of Law, Dyer 245. b. & 2 Inst. 142. Unreasonable Customs are not confirmed, and, by Williams, this Custom is so, therefore he demurred, because as Baggs Case, & 2 Inst. Nullus liber homo capietur, &c. But per Legem terræ, which is by Summons; and here they may do it on his appearing in their Court generally, whether Citizen or not: Also here is no way of Trial direct, but only if it appear to them, which is injust. Also F. N. B. 142. there is an ordinary Remedy by Ravishment de Gard, in which Case nunquam recurritur ad extraordinarium: Also it doth not appear but the Orphan was married at the time. And per Curiam, as to the entitling of the Defendant, being in a Plea, it must be particular, but in Return of Mandamus's, there would be no Exception. Another Exception was taken to the Custom, That it was not only to have the Custody of the Lands of such Orphans in the City, but all over England: Sed per Curiam, this might be a Question before the taking away the Court

Court of Wards, but where it's no prejudice to a third person, as mean Lords, they may have Custody all over England; also constant practice having been with the City, unless some Presidents have been contrary, it's now too late. Sed Adjornatur.

Siderf. 252. pl. 22. Ampcots *against* Ampcots.

(18) Formedon.

ERror of a Judgment in C. B. Newdigate for the Plaintiff its Error of a Formedon in Remainder where the Plaintiff counted on a Feoffment, 38 H. 8. by Alexander Ampcots, and sets forth the Death of the Issues in Tail, to which the Defendant an Infant by Guardian pleaded, that she was Seised in Fee; and induced it by Conveyances, and prayeth the Parol may demur; the Guardian dyeth, others are made; the Demandant counterpleads the Age as in the Count, and prayeth she may be ousted, and by Judgment the Defendant was ousted of her Age; and the Judgment there held peremptory by the whole Court of C. B. which he conceived to be but a Respond. ouster; and this being but a special Verdict, was said to be all one with a General Verdict: Also that Action upon the Case lieth against Guardian, if he doth not pray Age when he ought, but 2 Inst. 291. he shall have age in Cessavit in his own time; Also this Verdict is no more then a demurrer, in which Case it was there agreed, the Judgment should not be Final, the truth of the Case being alike disclosed in both; Also Issue upon a Collateral point is not peremptory, as Utlary 47. Also this is a delay without a Contempt, therefore not peremptory, 2 Cr. 467. Also because the Plea is true: Also Recoveries are good by Guardian, because Action upon the Case lieth against him, but here it would be no remedy, because one Guardian pleads the Plea, and another prosecutes, 24 Ed. 3. 76. Age Br. 26. & Peremptory, Br. 25 Ed. 3. 80. pl. 2. must be understood that such Plea is peremptory only against the Age, Voucher 17. 119. insisted on in C. B. this is in lieu of a peremptory; Also this delay is by the demandant himself for four Terms, else the Tenant might have had Judgment the same Term of his Age, Latch. 177. or to be ousted; Also the Demandant himself prayeth only, that the Tenant may be ousted of his Age. Jones for the Defendant in the Error, Tenant in the Formedon, the difficulty rests chiefly on the Traverse taken, the Case being, that in a Formedon the demandant doth counterplead the age, and upon matter of Fact arising an Issue is joyned, and found specially;

cially; and now he conceived the Judgment must be peremptory, for in all Pleas in abatement, the prayer is only quod breve cassetur, yet the Court give Judgment peremptory, or not, as the Law stands, L. 5 Ed. 4. 90. b. Its laid down as a Rule, that Issue joyn'd in all Actions is peremptory, to the Tenant if of full age; and there is no difference Warranted by any Authority, of an Infant from another man: And particularly Instances of this Rule are, that of the Counterplea of Voucher, which on demurrer is not peremptory, W. 2. cap. 6. unless in another Term since that Statute; and were it a Plea in Bar, the demurrer would be peremptory also: Likewise Issue on Excommunication, 50 Ed. 3. 20. is peremptory in every dilatory Plea, 3 H. 4. 3. Issue against Tenant is peremptory, but on demurrer only such Pleas as are puis Dar. Continuance, pleaded after Issue, are peremptory, L. 5 Ed. 4. 129. 2 Ed. 4. 10. Yelverton 112. Some Books make Infancy Tryed by Inspection not peremptory, 33 Ed. 3. Issue 14. Age 122. but strongly implied that Trial per pais is, because more dilatory, and lying more in the knowledge of the party and his Counsel; the Court agreed the Rule, that Plea in Abatement on Issue is peremptory: Also the prayer cannot be otherwise then breve cassetur; the Tenants Plea was that the demandant was seised in Fee, absque hoc that he was seised in Tail, Issue thereon found for the Plaintiff, Judgment Affirmed, Nisi.

Matthews *against* Hopping. Ante.

Hill. 16 & 17. Car. 2. Rot.

(19) Ways. JOnes prayed Judgment in Action upon the Case, that a common Carrier, who by the Custom of the Realm ought to carry, &c. but its only said the Plaintiff delivered Goods to the Defendant for a certain price then agreed to be carryed to D. and that he accepted the Goods to carry accordingly, which is well enough, without shewing the Defendant is a Common Carrier, and there need no promise be laid, because as 2 Cr. 262. its a misfesance, in which Case if I deliver Goods to a Factor to sell for ready Mony, and he sells without, such Action lieth, and the Allegation that the Plaintiff delivered; and the Defendant accepted these Terms, doth tantamount to a promise; and the recital is part of the Common Law, and Declarations would be good without such recital, which is but a Formality, and after a Verdict insignificant, but Statutes are privative of Common Law, therefore if one be mis-

misrecited, the Action is not maintainable on another. And 2. the joyning of a Trover in the same Action for the same Goods, and found Guilty generally of both, and intire damages is well enough, the first Action being for a tort, as against a Shepherd for Misfeasance in keeping Sheep, so they are well enough coupled: But Keeling contrà; Tort can never be made where there is a Special Agreement, unless there be duty by Statute or Common Law incumbent, as on Shepherd or common Carrier. And by Hyde, here is nothing but the particular Agreement that is obliging, therefore if any thing, an Assumpsit lyeth: Also by Twisden, it must be such a tort that implyeth Force and Arms with which Trover may be joyned, as if Shepherd destroy Sheep; but what is generally called tort, as wherever any parlance is of malice and fraud, or negligence, is not sufficient to be joyned with a Trover. Judgment for the Defendant.

The King *against* Pintchard.

Monday, April 17.

THe House of Lords ordered him to be committed, and delivered the Order to the Serjeant at Arms to take him, and after the House Prorogued he was taken and detained till Fees paid, and Security given to appear the next Sessions, which, per Curiam, is illegal, and such Order cannot be executed afterwards. But by Hyde Chief Justice, the Chancellor of course may cause their Orders to be executed: But by Twisden, he must have a special Order from the House to execute their Orders. But by Keeling and Windham, the House of Lords is not like other Courts, but is wholly determined by Prorogation, and ceaseth till the next Session: And so was Streaters Case on Habeas Corpus, 1654. he was delivered, the Parliament being determined, against which he spake those words for which he was committed. Adjornatur. (20) Parliament. Siderf. 245. pl. 7

Drewe

Drewe *against* Slowly.

(21) Assumpsit. ACtion upon the Case, that whereas the Defendants Father was bound to the Plaintiff in several Bonds, and he intended to sue the Defendant as Son and Heir, he in consideration, the Plaintiff would forbear to sue, and deliver those Bonds, the Defendant promised to pay Jones: After Verdict for the Plaintiff, moved in Arrest of Judgment, that the whole Consideration being Executory, and in nature of Condition precedent, its not sufficient to say he did forbear, and was ready to deliver up the Bonds only, but that he did deliver them actually, or offered so to do, and the Defendant refused, which by Keeling is ill, and not the whole, that is in his power to do, which the Court agreed.

Judgment staid.

Dolbens Case.

(22) Mandamus. WIlliams prayed Mandamus to admit Clerk of the Fines in the Marches of Wales, which Hyde and Windham denyed, in regard it lieth not, because it doth not appear what the Office is: Twisden said that it had been granted to admit to a Freedom, 18 Car. 1. which Windham said was an anomalous President, and lately under debate. Keeling said it was grantable by Magna Charta, as well to admit as to restore: and this Office being granted by Patent, a Mandamus lyeth, the party having a certain Estate, as Dr. Goddards Case, though private: Also the Court were divided, as to the Gift of this Writ, to swear Administrators or Constable.

Adjornatur.

Randal *against* Kite.

Mich. 15. Car. 2. Rot. 849.

(23) Sheriff. IN debt upon a Bond, the Defendant pleads the Statute of 23 H. 6. and shews that upon a Plaint out of Court Baron, certain Goods of the Defendants were upon a Plaint, taken within the Parish of St. Clement Danes; and so being taken Colore officij, is void: To which the Plaintiff demurred, because on 10 Co. Beaufages Case, the person is not in danger of Imprisonment, and the Statute is made for the liberty of mens persons, not of their Goods. 2. If Goods are said to be Attached in St. Clements Danes, and doth not shew that St. Clements

Clements is within the Jurisdiction of the Court, as Brown *againſt* Adams, 3 Cr. and Johnſon *againſt* 1 Cr. Jones for the Defendant, conceived that any Bond taken otherwiſe then the Statute directs, is void, as when taken of one that is in fear of an Arreſt; but the caſe of taking Bond on Execution by Elegit, is upon particular Reaſon. 2. If the Bond ſhould be void, if they have Jurisdiction à Fortiori, where they have none, elſe the Defendant would be in a worſe condition; and therefore if the Bond be not void by the Statute, it's void by common Law. Twiſden ſaid the Clauſe, That all other Bonds ſhall be void, relates only to the former Clauſe of ſuch as were in Priſon, yet he doubted, that if one give Bond in fear of an Arreſt, it may be void, but it extends not to this: Alſo this Bond is not entred into to the Baily, but unto the Plaintiff, yet ſuch Bond is void by common Law, elſe thoſe Inferiour Courts will be in better caſe then the Superiour, which Keeling agréed; and that if this be out of the Jurisdiction, it's ſo much the worſe: The Plaint was of 39 s. in the Court of Norton-Folgate, and the Baily cauſed Bond of 40 l. to be made to the Plaintiff, to appear and render the Defendant on Judgment, or pay the Condemnation. Hyde Chief Juſtice, Though the Bond be neither void by Statute or Common Law, yet being on Record, if it appear void, as it doth here for the unreaſonableneſs of the Sum extorted, the Court may vacat it, for the diſtreſs there ſhould be but ſmall. Windham conceived this neither void by Statute, nor by common Law; But before any Opinion given, they ordered an Information to be againſt the Bailyes for this Extortion.

Collet *againſt* Purdieu.

Tueſday, April 18.

(24) In Eſcape, Br. 37.

THe Plaintiff having two Judgments in this Court againſt the Defendant, and Execution againſt him, and he actually in the Cuſtody of the Marſhal; and then he forgeth a Letter of Attorny to acknowledge Satisfaction, which being delivered into the Office, Walter the Officer certifieth to the Marſhal, That he had received a Warrant betwéen ſuch parties, by reaſon whereof the Marſhal lets him go; which, per Curiam, is an Eſcape, unleſs the Attorneys hand were to it, or a Superſedeas delivered; and the Court cannot Award any new Execution quia improvidè in neither Caſe, without a Superſedeas.

Whaly *against* Anderson.

(25) Assurances.

IN Ejectment of the Manor of Sibthorp, on the Lease of Sir Ch. Herbert, Special Verdict find the Marquess of Newcastle seised in Fee, and demised to Moor, &c. for 99 years, Condition to pay 2500 l. by a day, or redeem sooner, Moor dyed, Woollaston and Allestry, and the Lady Morgan, who was Cestuy que trust, assigned to Warren, and afterward Whally purchased the Reversion, and for 2500 l. he redeemed, and then he caused the Assignment of the Lease to Sir Ch. Herbert, &c. to be passed in trust for old Whally, if he repaid in that mony which was not paid, but in Consideration of 2500 l. paid by Sir H. Springat, and of Marriage with his daughter to Sir Ch. Herbert, and they by direction of old Whally assign in trust, That 200 l. per Annum out of the Profits should be to the Plaintiff and his Wife for Life, &c. The last Indenture is found not to be in trust for Ed. Whally the person attainted, but to the Uses of the Indenture, wherein some part in Remainder, and residue was limited to him; and if this tearm were so in the actual possession of the person attainted, that it's forfeited by the Act, and 2 Cr. 512. Jones for the Plaintiff conceived he had not; For 1. by reason of the Traytors Reversion, whereby he had power of redemption of Assignée of the Lady Morgan. 2. By the Indenture of Warren to Herbert, Whally on the future payment of the Mony, had a contingent trust. 3. By the last Indenture, the residue of the profits above 200 l. per Annum, and the Charges of the Trustees is actually limited to old Whally; but notwithstanding any of these the King can have no Title: For as to the first, the King can only have the Condition, and must pay the Mony when the time cometh, 1670. before he can redeem. 2. The second did depend on an Act to be done, which was not upon November after that Assignment; therefore seeing the Traytor could not, the King cannot now take any advantage of it: The only matter of difficulty arieth on the last Indenture, which giveth no Estate in the Land to the King, the trust being only of the Residue, and no value found, nor can be intended; and if the Court cannot adjudge a Surplusage, the Court cannot adjudge the Kings Interest. 2. Admitting there be any Interest, then whether this Residue after a Residue shall swallow up all the rest, which upon the reason of other Cases it shall not: I agree, that by Utlary the King is intirely entitled to personal things, as to an Obligation, an Horse or an Ox, as Pl. Com. 243. Dame Hales's Case, which

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is the highest in case of Joyntenancy; but things in possession, that may be divided, as Chattels real, 3 Co. 55. do only go in part to the King by Attainder of Joyntenant: The term forfeited in Dame Hales's Case was granted to them, as Baron & Feme, after marriage, when there could be no Moieties; also in that Case the forfeiture of the Husband is taken as a disposition as an Utlary, in that this shall relate to the act done in his life time; but the Land of Joyntenants is divided, the profit by Writ, and the possession by Fact, but the Estate is joynt only; but in our Case is no Joynture at all, for Ed. and John can never take their profits together, but John first, and Ed. to have the residue, therefore they can be but Tenants in Common by this dividing of the profits, which may be as well as by dividing the Estate; so the Attainder of Ed. cannot forfeit the Interest of John. 2. The purview of the Act of Attainder, That all Lands in trust should be forfeited, must be construed by the saving of Strangers, the meaning must be, that the King should have the same Estate in Law as the Cestuy que trust, who is Attainted, had in Equity distributively according to th. Traytors Estate, if for Life only, or in Remainder; and had Ed Whally been living, he could not have had the Estate in Chancery, as the Defendants have it now; but the Trustees might have been enjoyned to render the Surplusage to him, if there were any, but could never decree any possession to the Traytor, therefore is not the trust within the meaning of this Act like the Statute of Uses, which on Feoffment made before to such Uses as in our Case, would never have vested any actual possession in the third man, and left nothing in the first or second: Had the trust been by way of Rent, as that the Trustees should have permitted the Traytor to receive such an Annual Sum, he might have had a Petition to the King to execute it; but here it is to permit John to receive 200l. out of the Profits, so he is Perner, and the others come in but in Remainder, and therefore cannot sweep away the Estate of the Land from those against whom no pretense of disability is made.

2. Bigland for the Defendant, That Ed. Whally had once a trust, and so it's forfeited by Attainder; for though Ed. did not pay the Mony at the day, yet upon the latter Settlement he doth, being party to the Agreement of Settlement by Sir Ch. Herbert, and directing it, and place in matters of Conscience being but circumstantial, and the party hath convenient time to pay, and the trust remains still in him, so though the Mony were paid by another person at another day, being by direction of Ed. is well enough paid to make him Cestuy que

trust: Also the King by limitation of the Residue shall have the whole, and the other parties interested must come by Petition to the King, but cannot enter on him, nor his Patentee, being intitled by Record, 4 Co. 59. Stanf. Prærog. 79. Also by the finding of the Verdict, that it was not in trust for Ed. Whally, but upon the Trusts in the Deed, the Conclusion being Special, the Court are not bound by the Conclusion, but may judge on the whole Record.

1. Windham said at the Trial it was agreed, that Edward Whally had the Reversions, and power to redeem the Lease; and he procureth the Match of Springat, whereby the Mony to Sir Ch. H. was paid upon Marriage agreement, and if this be such a payment as will return the Trust to him, and so come to his Son as by his Assignment, was the pinch at the Trial: And I have known that, where one Mortgageth Lands, and after Leaseth by Estople, and after procureth Mony to be repaid, and assignment to be made, it was held that the Lease by Estople would first take place before the Assignment, which Twisden remembred, the Case of a poor man in Hackney.

2. Keeling said Whally had no Equity in the Lease for years, but only to pay the Mony in 1670. but if we admit he had once a trust, its plain and clear, no Subject could ever take it out of the Crown, but here whoever procures the Mony, the use in present turns to his Advantage that paid the Mony, and so the 200 l. per annum is clear from forfeiture, and nothing of certainty of Surplusage appears, which Twisden agreed: So Hyde. Adjornatur.

Pate Lessee of Sir H. Hern *against* Brownlow.

Wednesday, Apr. 19.

(26) Common. IN Ejectment of a Marsh, the Plaintiff claimed as parcel of the Manor of Cressy Hall, the Defendant as parcel of the Manor of Newbery in Surflet in the County of Lincoln, but it appeared to be a Marsh in Common to two Mills, between them and their Tenants by prescription for their Sheep being Salt, Quære if this may be approved: The Plaintiff also claimed as derelict, but being overflowed by the Sea at Spring Tydes, he was Nonsuited.

Wright

Wright *againſt* Sherrard.

Thurſday, Apr. 20.

IN Ejectment, on the Leaſe of Dr. Poklington, of Ten Hydes of Land late the poſſeſſions of the Priot of Peterborough: And by the Solicitor, a Hyde of Land is the ſame as Carucat, which is as much as a Plow, which uſually is intended to have ſix Horſes, (the moſt may manure in a year, within this County of Northampton,) is between 100. and 120. of Acres at Erklingborough, which is about five Yardland, each Yardland being 24 Acres of Arable and of ley, and 16. of Meadow and Paſture. 2. An auncient Deed is good Evidence, without proving, or Seal on it, as 44 Eliz. (27) Meaſures.

The King and Capell *againſt* Baud and Segrave.

Friday, Apr. 21.

ON Habeas Corpus they were Return'd, as committed by the Lord Cheſterfield the Queens Chamberlain, for Arreſting one of her ſworn Servants, and per Curiam, they were delivered, becauſe ſuch have no priviledge, but as the Servants of the King; and the complaint ought to be to the Kings Chamberlain, as the only Officer taken notice of by Law, and who hath the only power to commit in ſuch Caſes. (28) Priviledge. *Vide ſupra 842.*

Dean of the Arches. Ante.

GUillim and Duhurſt were Executors of Allington Adminiſtrator, then Duhurſt dyeth, and the Executors of Duhurſt being ſued for Legacy given by Allington to Guillim, they pleaded that he was not chargeable, becauſe Guillim ſurvived; And that on his Death Adminiſtration was granted of the Goods of Guillim to the Plaintiff in Spiritual Court, whereupon the Plea being diſallowed, Symſon prayed a Prohibition; Twiſden, whoever hath the Goods may be ſued as Executor of his own wrong, and muſt be named only Executor generally, not Executor of his own wrong, and by the ſame Reaſon that Executors of him who did not Survive, may be charged by the Adminiſtrator of the Survivor, as Executor de ſon tort, which Keeling agreed, if the Defendant were ſued as Executor of Duhurſt, who was Executor of Allington, it cannot be as Executor to an Executor, de ſon tort, the (29) Executor.

Libel

Libel was against Gill as Executor of Duhurst, Executor of Allington, which prima facie is well enough, to which the Defendant pleads, that William was named Co-executor with Duhurst of Allington; And that Duhurst dyed first, and William Survived, &c. but he doth not deny but that he had the Goods of Allington in his hands; and therefore in our Law he is suable as Executor to the first Testator, yet if the form of the Spiritual Court be otherwise, its more proper to have an Appeal, rather then a Prohibition, which the Court agreed; and by Hyde, in suit for a Legacy against Administrator of Executor on gift by the first Testator, if by their Law Administrator to Executor be so to the first Testator, they have at worst proceeded, inverso ordine; in which Case its proper to Appeal; wherefore the Court denied a Prohibition.

Siderf. 249. pl. 8. Buckler *against* Angell.

(30) Assumpsit. HYde moved in Arrest of Judgment, in Action upon the Case, in Consideration that the Plaintiff would procure the Lease of a House of one Woodward, to be surrendred to the Defendant, at his request he would pay and content him 10l. On Non Assumpsit, and Verdict for the Plaintiff, per Curiam, the Judgment staid, because this is but Evidence of a promise, without expressing quod super se Assumpsit; and this Issue is no Affirmative and Negative, no promise being laid in the Declaration. Keeling held this but form, and ayded by the Verdict: But Twisden said, the first Case he ever moved in Arrest of Judgment was, that the Defendant in Consideration the Plaintiff would deliver certain Hops, he would pay him, &c. and being not said, super se Assumpsit, Judgment was staid: And so per Curiam, præter Keeling, it was here.

The King *against* Boroughs.

(31) Rescous. NOta, by Keeling, that the Court never Fine Sheriff on Male Return of a Rescous, because its voluntary; but they allow Exceptions to quash it, because the party cannot Traverse it; but where he is compellable to make Return, he is finable, which the Court agreed; and the Court quasht this for want of Vi & Armis, though it be said Rescussit.

The

The King *againſt* Blunfield.

Saturday, April 22.

ON demurrer to Indictment of Subornation of Perjury, Coleman excepted, That being under the Stile of Oliver Protector of England, Scotland, France, &c. before his Juſtices of Goal-delivery, it's not confirmed by the Act of Oblivion, but remains Coram non Judice; Sed Curia contrà, becauſe the Act is Notwithſtanding any alteration of Stile, which is intended any other then the King, not ſuch Stiles as were not allowed in that time. But by Keeling, had it been under the Stile of Charles the Second, King of England, Scotland, France, &c. it had been well enough. 2. It was quod ulterius Recordatur, that in ſuch a Suit A. came in and ſwore, and the Defendant did ſubborn, which is only a Recital: But per Curiam, it's well enough as well on demurrer, as after Verdict. Alſo by Twiſden, the Court cannot force the King to waive the demurrer, unleſs the Attorny General conſent; but for the Kings advantage they may. 3. The Iſſue was on Solvit ad diem, and the Oath was only, that it was paid about the day, which, per Curiam, is well enough, the Perjury being aſſigned in Non-payment generally. (32) Perjury.

Judgment pro Rege.

The King *againſt* Middleton.

KEeling excepted to an Indictment of Aſſault Battery and wounding; The Jury find him guilty de Tranſgr. & inſult' prædict. only, and ſay nothing of the Wounding: Sed per Curiam, its well enough, and comprehends the whole; contrà, if it had been de inſult' prædict. only. 2. The Preſentment Traverſe and Trial, as Brumſteds Caſe, was all at the ſame day, and Seſſions; which being ex aſſenſu, is a favour to the party; and the Court having a General Juriſdiction of the Cauſe, its well enough. Judgment affirmed in Writ of Error. (33) Taeſpaſs.

The

The King and Mills *against* the approved men of Guilford. Ante.

(34) Mandamus. TWisden said, he knew no difference, as to this granting Mandamus, between a Suspension for words spoken, till he acknowledge his fault, and between a Remotion; Sed Curia contrà, it's well enough, as commitment by Justices till the party find Sureties of his Good-behaviour: But per Curiam, there is no power of Suspension returned, as there ought to be: But by Windham, this is an Incident to every Corporation.

Rabie *against* Robinson. Ante.

(35) In Enfant, F. 6. ALL parties waived the Exception of the Fine, and insisted only, That an Infant, when of full Age, cannot reverse a common Recovery wherein he was vouched, being an Infant, and appearing in person: And by Twisden and Keeling, he may on a Recovery assign this for Error at any time, being triable per pais, and by them it is Error; and Mary Portingtons Case is no Law, that it may not be suffered by Guardian: And by Hyde and Windam, this ought to be assigned for Error during Nonage, on 1 Inst. 380. But Wild excepted to the Writ of Error, which was of a Record quod fuit coram Justiciarijs de Communi Banco, and doth not say Justiciariis nostris, nor Coram the Chief Justice & Sociis, which per Curiam, is incurable, and doth not remove any Record from the Common Pleas. Sed Adjornatur.

Ludwell *against* Symson.

Monday, April 24.

(36) Devise. Stiles 301. THe Defendant claimed by devise of the Lands in question, paying Debts and Legacies, it's Fee per Curiam, which is put in writing during his Life, and read to him, per Curiam, the Lands pass though there be no Legacies, or only paroll Legacies; but if the directions were to devise on Condition, and it's written without the Condition, it's void: But without directions, if devise of Lands be officiously put in writing by any of the standers by, in the life time of the Testator, it's good enough. 3. These ought to be paid in convenient time, and being to Strangers, need not be demanded; nor by Glyn, Golsb. 75. need they be demanded at all, as on devise paying 120 l. viz. to one so much, &c. and it was urged,

ged, that it ought to be demanded, Bridgman. but adjudged that it was a Sum in gross, and needed not be demanded, by Glyn Counsel in C. B. But here being question of the Will, Non-payment within a year is not sufficient, without a wilful neglect, per Curiam: And by Windham, if direction be given to devise, paying debts only, and the Writer adds Debts and Legacies, it's good enough, which the Court agreed; and the after reading is but additional Evidence. The Court also agreed, that though the Title be The Will of J. S. made by paroll only, yet being in writing, is a good Will, which the Court agreed.

Dr. Dolbens Case. Ante.

(37) Mandamus.

THe Court, on perusal of the Presidents of Dr. Goddards Case, and Townsends Case, and Latch. 123. which appears by the Roll to be granted M. 17 Car. 1. Rot. 31. to admit Clerk of a Parish to swear, Arch-deacon of Chester, Trin. 18 Car. 1. Rot. 123. Rogers's Case, to admit to a Freedom, were, as at first, divided in Opinion; Twisden and Keeling, That unless this goeth, the party in remediless: Windham, That he may have an Action upon the Case, and after this; So by Hyde: But at last a Mandamus was granted, Nisi.

Lowe *against* Beaudmore.

(38) Conspiracy.

ACtion upon the Case against two for conspiring to Indict the Plaintiff of Rescous, wherein he was found Not-guilty, and Counts quod scienter, the Plaintiff was not present at the Rescous, they caused him to be Indicted: Agreed per Curiam, That where one is Indicted of a bare Trespass, no Action lyeth; but where the matter of Indictment is Scandal, or cause of Corporal punishment, there it lyeth. Agreed also, That had the Count been only falso & malitioſe, the Action would not lye; but being more specially by Averment quod scienter fecit, the Court doubted.

Et Adjornatur.

Burton *againſt* Robinſon.

Tueſday, April 25.

(39) Enquest. Sider. 246. pl. 9

IN Detinue, after Verdict for the Plaintiff, which did not find the value of the Deed, the Plaintiff on Raſt. Entries 214. §. 13. and Gheynies Caſe, 10 Co. takes forth a new Writ of Enquiry de valore of the Deed detained, which the Defendant oppoſed, becauſe by the firſt Writ of Enquiry there is 20 l. damages given; and as Haydons Caſe the value ought to be enquired at the ſame time. Twiſden in Aſſumpſit againſt Executor, on fully Adminiſtred, Aſſets were found, but no damages; this cannot be ſupplyed by Writ of Enquiry: But by Windham, the damages here cannot be intended for the value of the Deed and damages alſo, but for one only, which the Court agreed, as Trin. 41. Eliz. Rot. 1916. Chippingdale *againſt* Orme in C. B. in placito detenſionis pro Equa, Paſch. 3 Jac. Rot. 745. Barclay *againſt* Hill, Hill. 5 Car. 1. Rot. 1637. in C. B. Dyer 135. and it being found by Verdict on Non detinet, that the Defendant had the Deed, the Court would hear nothing againſt the Preſidents produced, till delivery.

Nichols *againſt* the Manucaptors of Stokes.

(40) Scire facias.

IN Scire facias the Defendant pleaded in Abatement, which the Plaintiff by Admittance allows, and ſo never enters the Plea, but takes forth a new Scire facias to diſcharge themſelves on render of the Principal, which is warrantable by the courſe of the Court. 2. This Scire facias being in favorem, if he be not brought in before the Court riſeth, he is not to be admitted, though in the Afternoon of the Return of the ſecond Scire facias, and though the Return were upon the 30th of Jan. the Kings Faſt. Windham and Keeling conceived in this Special Caſe, being by Act of Parliament a Holy-day, the party is receivable at any time of the day, the ſitting of the Judges being diſpenſed with, and another Service appointed; Sed Twiſden contrà totis viribus: But all being done pendant a Reference, the Court referred it, and if true, will Award a Superſedeas, Quia improvide.

Erington

Erington *against* Hurst Executor.

DEbt on Obligation to pay on request, on Non est factum pleaded, Special Verdict find the Testator seal'd and delivered the Bond; and that the Plaintiff as the Kings Commission Officer, detained the Testator as a Prisoner at War, untill he gave for his release the said Bond, and find the Act of Oblivion. Tourner for the Plaintiff, that the Bond is not discharged by the Act, because one Bond given to another is not mentioned, nor is any Crime or Offence, Pl.Com. 173. and these were the only mischief and intent mentioned, therefore shall have no other Construction: Also this is Collateral, as Bond given for Arms preparatory for the War; and the general words, all other Acts relating thereunto, must be intended Acts of the same nature with the principal, as Assault and Battery, &c. Lindly for the Defendant, All personal Actions, which, as 1 Inst. 285. 8 Co. 153. Lit. Sect. 512. comprehend Bonds, which were by reason of any Act of Hostility in the late Troubles; and therefore in a Legal Sense, is within the Act, as if specially named; the words of the Act, being farther, Or what ever hath ensued, on any such Act of Hostility. 2. Had the Act only made the Bond void, it must be specially pleaded, but being enabled by the Act to plead non est factum, its well enough. (41) Dures, Fitzh. 5.

1. Keeling said, the Act intended not to discharge, such as may discharge themselves by other Pleas; and here the Defendant may plead Dures.

2. Windham said, he knew that in the Circuit Trover, after demand de novo made, was for Horse, though the injury of taking away be pardoned: Also all Contracts were drawn on by Acts of Hostility, in those times.

3. Twisden said, the Acts Pardoned, were such only as immediately concern'd the Acts of Hostility, not of each particular Contract: Also by Keeling, the injury must be Hostile, as Action of false Imprisonment, and not ordinary Contracts, as buying Arms, non refert to what use I put them, but I am bound; all Actions ex delicto are pardoned only.

Adjornatur,

Howard *against* Spencer.

Thursday, Apr. 26.

(42) In Common Br. 9. ON opening the Record, by Jones, in Trespass against Commoner, he justifieth by filling up Trenches made by the Lord, whereto the Plaintiff demurred; and by Windham, Commoner may fill them up: But by Keeling, he cannot where the Lord digs, but only where a Stranger, but he must have Action upon the Case. Adjornatur.

The King *against* Pritchard. Ante.

(43) Privilege. THe Return of the Habeas Corpus was, that he was committed March 27. to the Fleet till Fées paid, being taken into Custody by Lee, Serjeant at Arms of the House of Lords (not saying when, but only) by their Order, dated 11 Febr. Coleman excepted for the incertainty, it doth not appear what the Fées are, nor who should be Judge of them: Also the Commitment is not only for Fées, but till security given to appear the next Sessions. Adjornatur.

Dauce *against* Luce.

Mich. 16. Car. 2. Rot. 519.

(44) Trespass. Aderf. 246. pl. 10. IN Trespass for Assault, Battery, Wounding, and Mutilation, The Defendant pleaded Son Assault demesne; to which the Plaintiff demurred: And by Coleman, this is a special Offence, in which the King hath an Interest, and may be Felony, therefore though se defendendo be a good Plea, yet not Son assault demesne generally; but it may be specially pleaded, 2 Inst. 316. as that the Assault was such, whereby he was in fear of Maihm; for generally quod verberasset & maletractavit, doth not put any to a necessary defence. Pemberton for the Defendant, This is only for damages, therefore the general Plea is good, being si quod damnum be, it was of his own Assault, and in defence of the Defendant, which the Court agreed, the Count being laid quod mutilavit only, which the Court agreed, and the per quod he lost the use of his Arm, is not sufficient, unless it be laid, quod Maihimavit, as in Indictment or an Appeal, which is the same for the party, as an Indictment is for the King:

Also

Also the defence must be proportionable to the Assault as laid.

Adjornatur.

The King *against* Bently and Wadland.

Mich. 16 Car. 2. Rot. 474.

Bigland moved for quashing an Information for stopping a Water-course, per quod the Inhabitants lost the use of their Passage, and conclude ad commune nocumentum, but being only a private Offence, as laid there, needs no Certificate of Amendment: But being an Information, its not quashable by motion, being done by no parties, but by an Officer of the King, as an Inquisition, or Debt, or private Action upon the Case by the particular Inhabitants, as this is, therefore the party ought to demurr, which the Court agreed, being the course of the Court. But by Keeling, an Indictment is as much the Suit of the King as an Information, and demurrer may be to it, though it be a Verdict. (45) Sewers.

The King *against* Warren.

The Court conceived Addition not given in Indictment is cured by Appearance; it was against W. Hospes, without an Anglice, for keeping an unlawful Game of Nineping. 2. It was ad General' Session' of the City of the County of Exon, and said not Domini Regis, 2 Cr. wherefore being of a small Offence, it was quasht; but had the Offence been Riot, or Offence of Oppression, this is no cause to quash it. (46) Nosme. Siderf. 247. pl. 11.

Libtrat *against* Field.

Mich. 16 Car. 2. Rot. 366.

In debt on Obligation on Oyer, the Condition was, That L. and Nicholas should perform the Award of, &c. The Defendant sets forth the Award, and demands Judgment, being ex parte: To which the Plaintiff demurred: The Award was, That L. and N. should deliver up certain Writings indented inter eos fact. which was only between L. and F. and that thereupon the Defendant should pay 500 l. to N. which, per Curiam, is mutual; and though N. be no party, yet he may have possession, or be more concerned in it then L. that was party; and otherwise he would not have been joyned in the (47) Arbitrement. See this in Arbitrement, &c. 24.

the Award: Also an Award between one of one side, and one of another, is sufficient on a Submission by several.

Judgment for the Plaintiff.

Fosset *against* Fosset.

Thursday, April 27.

(48) Remainder. IN Ejectment, Special Verdict find Settlement to J. F. for Life, and after his decease the Moiety to the use of his Son, and Agnes his intended Wife, and the Heirs of their two Bodies; and if the Father marry, and his Wife is living at the time of his decease, to her for Life a third part, and after to the Son, and Agnes his intended Wife as before, under whom the Plaintiff claims; and it's found that the first Grantor died, and was never married, and that the Defendant claims under the Heir of the Grantor: And per Curiam, this Remainder is only contingent as to the Wife, not to the Son: But by Twisden, had the Feoffment or Settlement been to the use of the Feoffor, and his intended Wife for Life, Remainder to J. S. if he marry such Wife, here the Remainder is also contingent, which the Court agreed.

Judgment for the Plaintiff.

Wilkinson *against* Richardson.

Trin. 16 Car. 2. Rot. 471.

(49) Dismes, Br. 11. IN a Prohibition, The Plaintiff declares that the Dean and Chapter of Carlisle, is seised of the Manor and Rectory of Morlands; and that one Gibson a Customary Tenant prescribes that every Tenant of his Tenement have used to pay 3 s. 4 d. to the Lord, who is also a Parson, in discharge of his Rent of the said Messuage, and also of the fourth part of the Tyth-hay in Bolton-field, & ratione inde hath used to take the fourth part of the Tyth of such Hay, and therefore prayeth a Prohibition. And by Lindly, if any reasonable beginning may be presumed it shall support the Usage, 15 Ed. 3. Aid 33. So 1 Leonard. 11. & 1 H. 7. 24. though such Custom be not now reasonable, as considered abstractedly in themselves, and in our Case the Lord might pay Mony in discharge of this Field, and after the union of the Manor and the Tythe, might impose this Charge on this Customary Tenant, 3 Cr. 587. Somerton *against* Cotton, where the person claimed Lands, parcel of the Manor, in discharge of all the Tythes of

of his Parish, not saying that his Parish is parcel of the Manor, yet good. And the like is resolved in the Case of Biggot *against* Hern, Moor 483. and in the Bishop of Winchesters Case, 2 Co. 45. 3 Cr. 599. Also admitting this a good prescription in discharge, its also good prescription in the pernancy, for the fourth part of the Tyths, although it had been better to prescribe generally, for the fortieth part of the Hay, as Decimam Garbam; but in 2 Co. 55. its said he may sue for this in the Spiritual Court; but however, the Plaintiff cannot take it of the Tenant, yet the discharge is sufficient against the Parson. Windham said, that every Custom reasonably begun, cannot discharge, for thus Composition might do it; but it must be of a reasonable and common intent to discharge, which appears not here, but the contrary, for they should have been several, so much for the quitrent, and so much for the Tyth. Also the Lord and Parson were several, and the acceptance of the Lord cannot discharge the Parson; and if the Lord should grant away the Impropriation, it cannot appear what the Parson shall have; Also although the Lord might prescribe in such discharge, yet not a Copiholder, especially for Lands not belonging to his Copihold. Adjornatur

The King *against* Pritchard, Ante.

THe Parliament by Prorogation is quasi ended, and were the Prisoner committed for a contempt, the Court might in Convenient time have bail'd him: But here the want of the day of the taking is material, being in the knowledge of the Serjeant at Arms, therefore it shall be presumed, the taking was after the rising of the Parliament, which Court consists of King, Lords, and Commons, at which time all the priviledges of each particular House cease; and each Prorogation is a new Parliament, and the Bill twice red before, must now be begun anew; and therefore we cannot Bail him till the next Parliament, but the party ought to be discharged, Parliament, Br. 86. and 4 Inst. 1 H. 7. 20. in Flowerdieus Case, by Windham, Recognizance taken by Parliament, is fruitless by their Session, but Judgment given there is delegated to the Chancellor, being as a thing finished, but this is but Process: And by Twisden its all one, whither he were taken sitting the Parliament or after, for that's but a Contempt to them, which this Court may discharge; and in Cherryes Case, in this very Parliament, I heard it declared, that whatever is done, must at the next Prora- (50) Priviledge.

Prorogation be begun anew, except in Error, where Scire facias may be returnable at the next Sessions, being grounded on Judicial Record; But this is but matter of Contempt, which is discharged by the Session of Parliament: Hyde Chief Justice, 22 Ed. 3. 23. determins this Case, & omnes in omnibus concurred clearly, that he ought to be discharged.

Merrill *against* Rumsey.

(51) Wales. Siderf. 247. pl. 12.

IN Ejectment of Lands in Mounmothshire, Special Verdict find Edward Williams seised in Fée, and in Consideration of Marriage with Walter, Covenanted to levy a Fine to Powell, to the use of the Conusées in Fée, till a Recovery, and as after to the Lands in Landsawee, to the use of Edmund and Dorothy, the intended Wife, for their joynt Lives, and after either of their decease to her Heirs by him begotten, and for want of such Issue to the Wife for Life; she Surviving, the Remainder to the right Heirs of the Husband for ever. The Jury find the Marriage took effect, and that after a Fine was levied, but no Recovery, in which Case the Conusées were to stand seised to the former Uses; and that the Husband had Issue Rachael, whose Issue is Lessor of the Plaintiff; and the difference is now between the Mother, who is the Defendant, and the Children; the Husbands design was to provide for the Children, and to make a Joynture for her, of the latter Lands. Winnington for the Plaintiff, The Freehold on which these Limitations do depend, doth determine by the Husbands Death, though Lands given to two generally, as 5 Co. 9. Brudnells Case is for their Lives, and the longer Liver: But when there is any other Collateral Limitation, its otherwise, as here. 2. The next immediate Limitation to the Heirs of the Wife, are not words of Limitation, but of purchase, and is a Contingent Remainder, and not in nature of a discent from the Mother, 1 Inst. 22. b. must stand on this difference, where the Freehold is absolute, and not determinable on the Life, for else the Limitation and particular Estate cannot be Consolidate in one intire Estate; but as, when Lands are given durante viduitate, the Remainder to her Heirs generally, this is a Contingent Remainder, and by her Marriage the Freehold is determined, and cannot be Consolidate, 10 Co. 85. in Loveyes Case doth explain the Rule of my Lord Coke: Also this Issue cannot be Heir during the Wives Life, therefore as 3 Co. 20. this Contingent Remainder is destroy'd, else the Freehold would

would be in Abeyance, and none to take as Occupant, or otherwiſe, and theſe Heirs muſt be really ſo, Hub. 30. and not in appearance only. And 3. the Conſequence hereof is, that the Wife ſurviving, it's a queſtion whether ſhe can take, becauſe none could have an Heir, though they may have Iſſue during their lives; and on conſtruction of this Clauſe depends the whole Caſe; and this muſt be made, as 1 Co. 45. rather to make the Limitations good, then void.

1. Powis for the Defendant, This is an Eſtate Tail executed in the Wife, and a Special Verdict obtained by importunity; for had the Wife died firſt it's clear, and the dying of the Husband firſt will make no alteration: This Caſe is within the expreſs Rule in 1 Co. 104. Shellyes Caſe, which is indefinite where a Freehold (be it for the life of the ſame perſon, or a Stranger.) Perkins Sect. 337. is a ſtronger Caſe then ours; Lands given to A. and B. during the life of J. S. Remainder to the right Heirs of A. on the death of J. S. the Eſtate of A. is conſolidate, and during the Coverture ſhe hath but for life; but on his death it's an Eſtate Tail executed, there being once a Freehold in her, which ſhe ſhall be admitted to plead, and ſhew how by after Limitation it came into an Eſtate Tail, which it attracts as a Loadſtone; but if the Inheritance had been dubious, as Dy. 99. there the Freehold might be ſaid in Abeyance, Paſch. 1652. Goffage *againſt* Taylor, Stiles ruled by Brief F. 81. But the Special Verdict is ill, there being another Limitation of other Lands, which is indiſputably good, and they are not diſtinguiſhed by any ad tunc exiſtens, part or parcel, &c.

1. Keeling, as to the main, conceived it an Eſtate Tail on Littletons Caſe expreſs, and executed ſub modo, not preſently by Severance of the Joynture, as it would do by a ſeveral Conveyance; but on the death of him whoſe life keeps the Eſtates aſunder, they are united and executed: And the Exception alſo is fatal to the verdict, which Windham agreed; 2.
And that he did never ſee any Caſe argued more up the hill, here being no Contingency in Eſtate or Perſon, but as Wiſcots Caſe the Remainder doth not drown the Joynture, but by the death of either her Heirs are in by diſcent; and were this by way of Limitation of a Fine, the Heir might have a Scire facias or a Formedon to execute it: Alſo Iſſue and Heirs can be but one in this Caſe. So Twiſden, and Hyde Chief Juſtice, and all conceived on Gift durante Viduitate, Remainder in Tail, that on Marriage ſhe is Tenant in Tail. 3 & 4.

Judgment for the Defendant.

Hunt *against* Swain.

Friday, April 28.

(52) Heir. Siderf. 248. pl. 13. 1 Roll. 28. §. 57. Debt, F. 139.

IN an Action upon the Case against the Defendant as Heir on Obligation of 100 l. by the Father to pay 50 l. said, that in consideration of the Premisses, the Plaintiff would forbear to sue the Defendant, as Son and Heir, he promised to pay. Wild prayed Judgment after Verdict, though it be not alledged that the Obligation was of H. and his Heirs, as St. Paul *against* Rivers 1656. which was grounded on the Common presumption that all Bonds are so, and that the Defendant hath by this Plea and Consideration admitted himself bound for the Forbearance, is the meritorious Cause, which Windham agreed: But by Twisden and Keeling, it must appear how the Defendant is liable; and consideration of Forbearance doth not make general Indebitatus good without shewing Cause; but is good of it self, as to forbear Rent: Also Executors are bound without naming, but not the Heir, which Hyde agreed; and that lien shall never be intended, unless expressed.

5 Ed. 4. 99 b. per Moil.

Knight *against* Jacob.

(53) Slander. Siderf. 248. pl. 14.

COleman prayed a Prohibition on a Libel, for calling the Plaintiff Cuckold, which, as in 1 Cr. 110. Eaton *against* Aylet, is no Scandal. Twisden and Keeling clearly it's grantable; but Hyde and Windham doubted, but ordered Cause to be shewed why Prohibition should not be granted.

Rogers *against* Marshall.

(54) Trespass. Siderf. 248. pl. 15.

IN an Action of Trespass and False Imprisonment, the Defendant justifies by virtue of Attachment and Capias that issued out of the Palace Court, on Plaint there in an Action upon the Case against the Plaintiff by one Cave. To which the Plaintiff demurred, because 1. This is an Action upon the Case where the first Process is a Summons at Common Law, as it must be here intended, being not within the Statute, and being a void Process of Inferiour Court, False Imprisonment well lyeth, as 1 Cr. 394. Pemberton, The original Process here is a Pone, &c. and no Summons: But, per Curiam, this is not Trespass Vi & Armis, nor doth 19 H. 7. cap. 9. extend to this Court; nor is it specified of what nature

ture the Action upon the Case was, and here being no Appearance made it's not cured; also the Jurisdiction is not circumscribed, nor the Patent proper'd into Court. Adjornatur.

Dakin *against* Hulme.

Saturday, April 29.

(55) Execution.

THe Plaintiff being over-ruled at the Assises, that Ejectment lyeth not against Tenant by Elegit, though he be satisfied at the extended value, brought a Scire facias ad computandum, and notwithstanding the Defendant offered to plead, the Plaintiff entred Judgment, as, per Curiam, he may, being in actual possession by Satisfaction of the Elegit; and they wondered at the Judges Opinion, unless it had been on a Judgment which is uncertain for Costs and Damages: But they agreed the party ought to be punished for his Miscarriage; and here all appears on Record, so not like the abuse of the Process of the Court in getting possession, to which the Plaintiff hath just right: Referred to the Secondary to examine if satisfied.

Rable *against* Robinson. Ante.

(56) In Enfant, F. 6.

BAldwin for the Plaintiff, who demurred on the Plea in bar; and the sole question is now, If this Recovery may be avoided within Age only, or at any time; And he conceived that at any time, notwithstanding F. N. B. 104. K. So is the Lord Dyer 232. 1 Inst. 380. for in Fine and Recognizance, there are persons appointed to inspect the party, but in case of a Judgment Conus by Attorny, or in person, it's reversable at any time, he being not examined, 3 Cr. 565. Sedgborough *against* Rant, and he shall not be inspected, though he reverse it during Monage, Moor 460. Randall's Case, 9 Car. 1 Cr. Newport *against* Mildmay, idem quod Blunts Case, Hub. Locko *against* Palfryman, 1650. agreed that 10 Co. 43. Portingtons Case was no Law, that Feme covert or Infant should be examined on Recovery, 2 Inst. 673. Bargain and Sale by Infant is avoidable at any time by Entry, and Common Recovery is but a Common Assurance, is as well to be avoided by Error at any time, 6 H. 8. Saver default, Br. 50. Recovery against Infant by Guardian, being presumed on Contempt bound by his Appearance by Guardian, but our common Recovery is without title: On the reason of our Case is Daux *against* Paiton, P. 1650. Rot. 306. Stiles 216. Judgment in

Trespass reverst for this Error at full Age, that it not appearing otherwise, it will be presumed that he appeared in person, which is Error, Holland *against* Johnson, Bridgman 69. a Recovery was reversed by Error at full Age on his Appearance by Attorny, which is all one with his Appearance in person within Age, for this shall be tried in Pais, as Bartholomew *against* Hobs, 3 Cr. 323. pl. Hopton *against* Johns, Aylet *against* Walker, Trin. 1649. Rot. 220. was only if an Infant might enter on the Recoveror coming in as Vouchée in person. 2. The Writ of Error was of a Recovery suffered by A. to B. in C. B. not saying Curia nostra, coram Justiciariis of the said Court, not saying Coram the Chief Justice & Sociis suis, which per Curiam, is ill; but being in the late times, is not to be stood on.

2. Wild, for the Defendant, agreed an Infant may have a Writ of Error on full Age, but cannot assign this Error of his own Infancy for Error, nor was ever any Recovery reverst for this Error; but when he appears by Attorny, it reflects not on the honour and duty of the Court, therefore that may at full Age be assigned for Error, and tried by Pais; And it's a secret trust reposed in the Judges, and stronger then on Statutes, Moor 76. which yet shall not be avoided by bare averment by Aud. Quer. And if this Error be to be admitted, it will breed an Earthquake in Common Recoveries, and none can be sure of their Estates: Also this is in effect an Error against the Record, for Infant cannot so appear, 11 H. 6. 42. and by this Averment the Record would be avoided, Dyer 104. Error of a Judgment in Dum fuit infrà ætatem on default, adjudged that their Age should be tryed by Inspection, being by Title. Twisden, As no great Friend to Recoveries suffered by Infants, conceived Recovery by double Voucher, which may be presumed by warranty of his own, is as well avoidable as single Voucher, which is presumed on the lien of his Auncestor: Also this Trial may be by Inspection or per Pais, as it may be more dilatory, or not; as if it be assigned that he was, and yet is within Age, it's triable by Inspection: So when an Infant prayeth parol may demur for Infancy; but in Account against Baily, Account, F. 121. & 12 Ass. 37. Infancy was tried in Pais, and in Assize by Guardian, it being matter of Fact, was tried by Pais, 3 Cr. 853. Deighton *against* Bartholmew, it's Quære: But 3 Cr. 818. Green *against* Rosse, resolved it's triable where the Land lyeth, which is no more against the honour of the Court, nor more prejudice then when his Appearance by Attorny is assigned for Error: Also as 9 Co. 30. b. Stratamarcella's Case, Inspection is as much to

prevent

prevent delay, as for the manner of Trial. Keeling inclined the ſame way; and ſaid it was ſo agreed by all the Judges in Newports Caſe, although not Reported by 1 Cr. 307. but he could not reconcile himſelf, why it ſhould be here more then in a Recognizance reverſt, only during Minority, therefore would deliver no Opinion; but in omnibus agreed with Twiſden, and ſaid it was an excellent difference, and will go a great way, that the Trial may be by Pais or Inſpection, as beſt may prevent delay: Alſo Recoveries may be on Title by Appearance in the Office, and the coming to the Bar is but the great care of the Judges. Windham always conceived that Judgment by default, as Dyer 104 was only reverſible during Minority, which is intended before Appearance; and there is the ſame care in Recoveries as in Fines; and the reaſon why Appearances by Attorny, being Infant, ſhall be tried by Pais, is becauſe there is in ſuch caſe no Warrant of Attorny, which is aided but in ſome Caſes by Statute; and I took it as ſetled, That Infant could not reverſe Recovery ſuffered by Guardian at any time within, nor at full Age. Judgment in Dower on default after default, is not reverſible by Infant during Nonage; Hoptons Caſe might be during Minority though ſecond Husband: The time alſo may make things otherwiſe triable by Certificate, as Profeſſion triable by Pais: If the queſtion be, if H. were profeſſed at ſuch a time, or not; and ſo the time made parcel.

Baker *againſt* Berisford. Ante.

JOnes waived the Demurrer for the Plaintiff, as no ſufficient Title: But by Windham and Twiſden, the Title is ſufficient; for when it's ſaid the Adminiſtrator paid ſo much Mony, and in lieu thereof did eligere & acceptare to take this term in Satisfaction; it is to be preſumed that he paid out of his own Mony, and not of the Teſtators Mony; the ſame where it's ſaid to pay Debts, which Keeling agreed. (57) Adminiſtrator.

Judgment for the Plaintiff, Niſi.

Brewer

Brewen *against* Rowe.

(58) Merchants. THe Court on Special Verdict on Trover and Conversion, conceived no doubt on 3 H. 7. cap. 7. but that the Statute is meant of Goods carried from Port to Port by Sea, and not by Land: But the doubt is, If Seisure by Customer of Goods, on Suspicion of Non-payment, be sufficient to charge him in Trover and Conversion, the Custom being duly paid. Also 2. if this Judgment in the Exchequer for Seisure be not sufficient to justifie the detaining: And per Curiam, Trover well lyeth notwithstanding, for the Seisure must be at the Officers peril, and the Judgment in the Information in the Exchequer is behind the parties back.

Adjornatur.

Whitmore Executor *against* Sir J. Jaacob.

Monday, May 1.

(59) Executors. Siderf. 249. pl. 16. IN Scire Facias on Judgment had by the Testator, he need not say in the Writ profert literas testament. And Raymond having for want thereof demurred, was over-ruled, per Curiam, on reading the Record.

The King *against* Hillarsden.

(60) Way. IN Indictment for not Repairing a Way, which she had made in lieu of Auncient Way, the Court would have no Exception till repair, in Arrest of Judgment; but ordered her to lay down the former inclosure, till the latter Way be repaired; and per Curiam, in Sir Edward Duncombs Case, 1 Cr. 366. it was resolved in this Court, that its not sufficient to keep such new Way better then ever the former was, but must keep it in sufficient repair, for the Kings People to pass.

Latchford *against* Elliot.

(61) Trespass. Siderf. 249. pl. 17. IN Trespass, for casting of Twenty Logs into his ground, Continuando is well enough on 20 H. 7. 3. by Wilmot, who therefore prayed Judgment for the Plaintiff, 1 Cr. Bret *against* Shirly, in Trespass for entry into Close, may well be with Continuando, though where several Entries are specified, the Continuando will not couple them: And Keeling conceived it well enough, because the Trespass doth continue

tinue, as where its for putting in of Cattle, and though it be ſaid Tranſgr. prædict. quoad Ejectionem ligni prædict. diverſis diebus & vicibus, it will refer only to that which is a Treſpaſs, which is the being of the Wood in his ground; the Court conceived after Verdict, this would be well enough, had it not been ſpecified, to be only quoad Ejectionem, for this makes it like cutting Trees, or taking a Horſe, which is but a Tranſient Act: And Keeling on Oyer of the Record, conceived the quoad tyed up the Treſpaſs to the caſting only, but the Treſpaſs being quod jecit & locavit lignum tam propè to his Celler, that he loſt the uſe thereof, therefore the quoad Ejectionem is void; And ſhould have been quoad Ejectionem or locationem, and therefore the Continuando is well enough. Judgment for the Plaintiff.

Coxe *againſt* Griffith.

Tueſday, May 2.

IN Ejectment, on Special Verdict it appeared, that Leſſee for 99. years aſſigns ſo much of his Term as ſhall be unexpired at the end of three Lives to Barnsby, who aſſigns the ſaid Indenture, and all his Eſtate, Title, and Intereſt, Reciting the ſeveral Deeds of Truſt, with Covenant againſt himſelf, only, that the Plaintiff ſhould quietly enjoy, and that he had power to grant, and whither by reaſon hereof, becauſe this Grant is uncertain and void at firſt to B. the Covenant be broken: Twiſden and Windham doubted, but by Keeling, this was only intended of the Title of B. not to make any other; But had there been no recital of the Truſt and Eſtate, a grant by Ceſtuy que Truſt, with Covenant for quiet poſſeſſion, is broken. Adjornatur. (62) Chattels.

Wilkinſon *againſt* Bolton. Ante.

CUſtom, that if Citizen dye, leaving Iſſue under 21. the Mayor and Alderman uſed to have Cuſtody, as well of the Body as Lands, or till Female do Marry; That for the ending of all Cauſes touching ſuch matters, there is a Cour of Record of Orphans, that the Mayor and Aldermen have uſed to commit the Cuſtody, and that if any perſon take away the Orphan from ſuch Committée, and it ſufficiently appear to them, they have uſed to commit the Offendor to Newgate, if he refuſe to diſcover where the Ward was, until he produce the Ward, or diſcover where it is, or be (63) London. Sider. 250. pl. 18.

be discharged by due Course of Law. 1. The Custom, that if such person appear in Court, they may commit, and do not say upon Summons, is good enough, this being a Theft, and the Summons need not be pleaded where the person is present: Also this is in Bar not in a Count: Also this being a Court of Record, and the highest privilege of Citizens, they cannot be presumed to do any thing precipitantly; Also this is a Criminal Case, Hutt. 30. Andrews Case, and Hub. 247. Lucks Case And. 2. The proceeding and Trial in this Court is Examination, not by Jury; and as to this the Custom is well enough, and so is the Commitment, till he produce the person, Register 79. as in Hom. repleg. And this may extend as well to Peers as others, as 11 H. 4. 15. Also F. N. B. 42, is but by Committee for Damages, but this remedy is to produce the Body it self. 3. This offence appears, therefore not like Specots Case, Also it appears by Examination, the Court conceived each particular Process needless: Also trial by Examination is not unreasonable, the like being by several Acts of Parliament referred to Justices of Peace: Also by Keeling, this being matter Criminal, the Commitment is well, and most suitable to be till the Infant stoln be produced. 2 R. 3. which confirms the Customs, is no particular Recital, as is mentioned on the Roll, but in the Exemplification, which in that time was used only to be sent to each party, and a short Memorandum only entred on the Roll: Therefore though general Act do not confirm any ill Customs, yet Acts that particularly recite them, do. Windham held this the best way to proceed against an Offendor; and their Rule must be Custom: Also it's a derogation to any Court that hath Jurisdiction, to shew the Evidence there, which was the ground of their Sentence, and the Commitment is but Lex talionis, and most reasonable.

Judgment for the Defendant, Nisi.

The King *against* the Lord Morly and Trevor.

Wednesday, May 3.

(64) Coron. The Grand Jury being unwilling to find a Bill of Murder, were brought into Court to be directed on the Evidence, which being clear, that he killed one Hastings; but against Trever it was only, that his Sword was drawn when theirs were, and that he was with him at the Tavern, and time of the Murder; therefore they conceived what he did was to part the quarrel, would find nothing against

gainſt him, but by Windham, & Curiam, unleſs he cryed out, or ſought to ſtay the Murderer, they ought to find bill a vera, which is only as much as that the Acculation doth not proceed of Malice, but from probable cauſe, which is ſufficient to find, and the party is never the nearer, being guilty or acquitted; but this is but in order to a fair Trial.

The King *againſt* Lucas.

HE being Convicted, in Action upon the Caſe on 14 Car. 2. for beating an Officer of Cuſtoms, prayed to be diſcharged, paying his Fine, in regard the Exchequer cannot free him, till it be Eſtreated, as was agreed on motion there; and the Eſtreats are only delivered in there at the end of Hill. and Trin. Terms: But, per Curiam, the paying of the Fine is the principal, and on Certificate thereof by the Court, or by Return on Habeas Corpus thither, the Exchequer may order his diſcharge, or elſe the Court on motion, and good cauſe may carry the particular Eſtreat of this Fine thither, and ſo they ordered to be done here. (65) Taxes.

In Cond. Br. 195. Moyl *againſt* Clapham. Ante.

Friday, May 5.

PRoviſo, generally, as 1 Inſt. is a Condition, unleſs it be ſomeways reſtrained by other words to a Covenant, as 3 Cr. Cromwells Caſe, and being in Articles of Agreement, it muſt wait on the Execution of the Conveyances, Yelverton 206. Briſtow *againſt* Kinke, to which it refers, as Bond to perform Marriage, and therefore Edkins prayed Judgment for the Defendant. Jones for the Plaintiff, This is but a Covenant, and being to pay out of the firſt three years profits, the Averment that he did receive ſo much profit is ſufficient; and if no Conveyance were made, there is remedy on the Articles; and there are no words that refer or direct to any proviſo to be in the future grant, nor would the matter bear it, for its an Office that relates to Juſtice, and therefore could not be reduced on Breach of the Condition: Moyl was to ſurrender to bring the other in, but could not reenjoy it, on Breach of Condition; Alſo proviſo is a word as natural for a Covenant, as a Condition. Keeling perceived not much difficulty in the Caſe, the intent being plain, that if ſo much profits were received out of the Of- (66) Condition.

fice as is confessed by the demurrer, the Defendant is to pay 500 l. Also this Proviso can never have any effect as a Condition, therefore must be construed by the Agreement of both parties, to be Covenant. 2. So Windham, the Count is sufficient, as its usual in Covenant to say he hath performed all on his part; and the words are sufficient, by proviso to pay, else it would have been said, that in future Conveyances there should be no such proviso, and if, as Stiles 406. pl. 868. Porter *against* Swet, in B. R. & Dy. 57. yealding and paying hath been adjudged an express Covenant, its not to be doubted at this time of the day, whither a proviso will amount to a Covenant. 3. Twisden agreed the proviso but a Covenant, but conceived it referr'd to a future Conveyance, and it should be averr'd, that he had made a Conveyance of the Office; and licet he hath performed all Covenants on his part, is not sufficient; but by the other Opinion, Judgment for the Plaintiff.

Howard *against* Spencer. Ante.

(67) Common. Siderf. 251. pl. 20.

IN Trespass, the Defendant as Commoner justified to fill up Trenches made by the Lord; to which the Plaintiff demurred on Yelverton 104. because there is a time when the Lord may put in his Cattle, therefore Action upon the Case lieth only; but where he hath the sole Common, he may fill up: But by Lindly, 15 H. 7. 10. is, that a Hedge set on the ground where Common is used, may be demolished, which Windham agreed: But by Twisden and Keeling, he hath no remedy, unless by the Hedge he be totally hinderd, and cannot take Common with it on either side, but the form of pleading must be, that a Commoner opened only so much as was sufficient, 2 Cr. 230. 195.

Adjornatur.

Entr. Cong. 68. Br. 2. Marke *against* Johnson.

(68) Leases. 4 Co. 72. b. Dyer 51. b. Poph. 22. b. & 53.

IN Ejectment, Special Verdict find lessor of the Plaintiff, was Lessee for years of the King, with proviso, that if the Rent were behind, that the Lease should be void; The Rent is Arrear; And the conclusion is, that if this do make the Lease void without Office, they find for the Plaintiff, else for the Defendant; but by Keeling, its provided by 21 Jac. cap. 5. that no advantage shall be taken of Arrears by Entry or Cesser, &c. so the duty be answered afterwards, before any Commission goeth forth to enquire of such forfeiture: But by Jones, the point intended was not on this Statute, but whi-

whither on Moor 291. pl. 440. this Proviso did so determin the Lease, that the King might make a new Grant to the Defendant. Adjornatur.

Nicholas *against* Stokes. Ante.

THe Court held, that the Bail must render the Principal sitting the Court, the day of the second Scire facias; and though it were the 30 Jan. a day of Humiliation, yet render in Afternoon was ruled ill: So per Curiam, it is on Declaration by the bye, which must be sitting the Court before they rise the last day of the Term. Judgment for the Plaintiff. (69) Bail.

Nutley *against* Norton.

IN Scire facias against the Auncester, on Judgment in Debt against the Defendant, as Heir and Tertenant, he shews an Entail to the Grandmother, and her Heirs in Tail; and that after her Death, the Defendants Father was seised in Tail, viz. to him and the Heirs of his Body: To which the Plaintiff replieth, that there was a common Recovery suffered by the Father, by vertue whereof he was seised in Fée, and dyed so seised, absque hoc that he dyed seised in Fee-Tail; to which the Defendant demurred, specially, because the Traverse is idle: North for the Plaintiff agreed, Traverse of impertinence as latter Lease, in Hub. 101. Fitzherbert *against* Digby, doth make the Plea void; so where the matter is before confessed and avoided, unless as here it be only argumentative, as Hub. 80. pl. 105. Newman *against* Moor, and 1 Cr. 61. pl. 67. Fenner *against* Nicholson: Also the Bar is ill, the viz. being of another Estate, not repugnant to the premises. Keeling held the Traverse void, being no Confession of such an Estate which cannot be given but by rightful conveyances as an Estate Tail, which is the reason of Helliars Case, 6 Co. 14. b. but if it were to an Estate in Fée, because that may be by wrong, the Seisin thereof is Traversable, but the Plaintiff prayed leave to discontinue, which the Court granted, it being for a just Debt. (70) Heir.

The King *against* Percivall, Godfry, &c. Ante.

Saturday, May 6.

(71) Peace. JOnes excepted in Arrest of Judgment before the Fine set, which is necessary after Conviction on Information of Riot, Assault, and Battery, &c. That the Venire facias and Distringas was Vicecomittibus Cantiæ quod Venire faciatis, and the Return is only Responsio Richardi Jennor, which is ill, and not amendable on the Crown side; and though here be but one Sheriff in fact, yet the Court must judge on the Record; and it hath been adjudged that one cannot make a Return out of London, which Twisden agreed: But by Windham and Keeling, Certiorari Coronatoribus, where there is but one, is well enough, being Ministerial, and in Execution of Justice: Also this being at Common Law, and not on any Statute, it's within the Statute of 21 Jac. cap. of Jeofails, wherefore they conceived this well enough, and at worst amendable. 901. pl. 75. Sed Adjornatur.

Hunt *against* Swain. Ante.

(72) Assets. LEek prayed Judgment for the Plaintiff, Sed Curia contrà, for though they may intend Assets, yet they will not intend a lien: and so was the Opinion of the Judges at Serjeants Inn. Judgment pro Def. quod Plaint. nil capiat per Billam. Twisden said he was never satisfied with St. Paul's Case.

Ampcots *against* Ampcots. Ante.

Monday, May 8.

(73) Error. WIld alledged Variance between the Original certified on Diminution alledged, which was Formedon per Breve Oliveri Protect. And the Record of the Writ of Error here was of a Record in Formedon per Breve Richard' Protect'. Et in nullo est Erratum being pleaded, the Court hath no Record before them, and though there might be another Original, yet because the Defendant hath not alledged Diminution, the Court hath no sufficient Commission to reverse this Judgment. Sed Curia contrà; for had there been no Original, the Court would have proceeded to reverse the Judgment, though it were before any Statute of Jeofails, and would not abate the Writ of Error for this cause. Judgment affirmed.

The

The King *against* Brein Bayly of the Savoy.

HE came in by Attachment, having levied Goods, and yet returned Nulla bona, for cause whereof, he saith, That one Verny, at the time of the Execution, shewed a Bill of Sale on good consideration, whereby he was lyable to an Action, therefore, without Security to save him harmless, he refused to make any other Return, which Keeling agréed; and the Court ordered the Mony to be brought into Court, and as the Trial goes betwéen the Sheriff and Verny, the Return to be amended, or not. (74) Sheriffs.

The King *against* Percivall, Godfry and Gilford. Ante 900, pl. 71.

KEeling said, If there be more then one Sheriff, such Return is ill, 14 H. 4. 34. but if there be no more, its well enough, as 39 H. 6. 40. and the Sheriff shall be called into Court to amend his Return, and say there is but one, which the Court agréed, which he affirmed on Examination in Court: But Twisden doubted, after Trial had, no such Amendment can be made. 2. Twisden and Keeling, That this Information is not amendable within the Statutes of Jeoffails, 1 Cr. 132. The King *against* Sherrington, Talbot But by Keeling and Windham, it's amendable at common Law, being Information: Also by Windham, though the Writ be Vicecomitibus, we shall intend but one, unless more appear, especially the Return being by R. S. Vicecomes, and not unius Vicecomitum. Judgment that Percivall, as the beginner of the Riot, be fined 500 l. G. and W. Aiders and Assisters 500 Mark apiece, all committed for a Month, and each find Surety of Good-behaviour for Seven years. (75) Sheriffs.

The King *against* Benson, Golborn, &c.

JOnes excepted to an Indictment of Forcible Entry into Lands which the Defendant held for term of years, and doth not say (yet enduring); which, by Twisden, is an old Exception; but being further Jam ultime elapsos it was worse, and it was quasht per Curiam. (76) Force.

Mason

Mason *against* Elliot.

(77) Slander. ACtion upon the Case for calling the Plaintiff Rogue and Thief, and stole the Sword of J. S. and he would Arraign him, and hang him for it. The Defendant justified, as Latch. 54. & Hub. Rawdon *against* Strut, because the Plaintiff clam & secrete, from the Parson of S. stole away his Sword against his will: And the Plaintiff took Issue quod non cepit clam & secrete, which is found for him, which, by Winnington, is Jeoffail, being found for the Plaintiff that pleads it, being not said felonice cepit: But by Jones for the Defendant, the matter disclosed is felonicè, and such conclusion is needless, unless in an Indictment. Also here no debt is confessed as in the former cited Cases, which the Court agréed on Nichols's Case, & Hutt. and Intent being to common Understanding, is sufficient. Sed per Curiam, the Plaintiff might have demurred on this Plea: But being after Verdict, Judgment for the Defendant.

Shipton *against* Shipton.

(78) Error. NOta pro Regula, If Writ of Error be not signed by the Chief Justice, the party on motion may take out Execution, unless a new Writ be taken out on notice within a week, or a short time; but if it be signed, though not returned, the Court will give Rules to certifie the Record on a second Writ of Error delivered, which in this Case is a Supersedeas.

Worrall *against* Brand.

(79) Abatement. In Error, Br. 117. JOnes on Affidavit of the death of one Executor, in an Action of Debt against two, on Contract of the Testator, which also appeared by the Record to be after Issue, he prayed no Judgment might be against both on Greisbrooke *against* Fox, Pl. Com. 186. b. But, per Curiam, on the death of one Plaintiff they may stay Judgment, but not of Defendants, unless in Trespass, which is several; for by Windham, they are but as one person, and one may proceed without the other on his default or death.

DE

DE TERMINO Trinitatis,

17 *Car.* II. *B. R.* Die Veneris, Maij 26. Anno 1665.

{Twisden,
Windham *went off sick on* Friday, June 9.
Keeling.

Bradshaw *against* **Savill.**

MR. Attorny prayed the sparing of an Attachment on 21 Jac. cap. for that it appears by Affidavit, that the cause of Action is under 5 l. and the Steward a Barrester of above three years, in which case the Cause is not to be stayed below: But, per Curiam, if the Cause appear by the Declaration to be above 5 l. he cannot proceed, as here, after Habeas Corpus to remove the cause delivered; but whether it be under or above cannot be made out by Affidavit, but must be returned so by the Steward, and he ought to allow the Habeas Corpus, whether it be above or under; but if it be under, he may proceed notwithstanding such Allowance. (1) Certiorari.

Sed Adjornatur.

Bevin

Bevin *against* Clapham. Ante.

(2) Bayl. IN Error on Judgment in Debt on a Judgment, which was had in Debt on an Obligation, Williams prayed a Superſedeas without Special Bayl, it being not within the Statute of 3 Jac. this being a Debt, not on any Bill, Obligation, nor Contract: Sed Curia contrà; the Contract is the Foundation of all, and the Statute as well intended to reach all Judgments, as to the Original thereof, for the Inconvenience; and the Court would not allow this Writ of Error without a Special Bayl put in, not to be any Superſedeas.

Ullocke *against* Temple.

Saturday, May 27.

(3) Error. Sidерf. 257. pl. 1. IN a Writ of Error on a Judgment by a Confeſſion Relicta verificatione in C. B. and good Errors aſſigned: To which the Defendant pleads a Releaſe of Errors: To which the Plaintiff replys Non eſt factum, and at the Trial would not appear, therefore it was entred on the Roll quod querens non eſt proſecutus. And now Wild, the Kings Serjeant prayed the Judgment might be affirmed niſi, as is uſed in the Exchequer Chamber in Error on Judgment in B. R. To which Twiſden inclined, becauſe by the Iſſue on Factum, or not, the Errors are out of Court; and now, though the Errors be good, yet the Judgment, as to this Writ of Error, muſt be affirmed; Sed Keeling contrà, the Errors being good, this Court cannot affirm the Judgment, becauſe the Iſſue Non eſt factum was never tried, nor nothing pleaded to the Errors themſelves, which the Secondaries and Clerks agreed; but by both, the party may have another Writ of Error, but that will be no Superſedeas. Adjornaur.

The King *against* Gurnye.

(4) Lieu. EDkins excepted to an Indictment taken at Stoke upon bar by Jurors of the Liberty of Guilford, Juxta Guilford, for an Aſſault and Battery of an Officer in executione Officij, becauſe it's not ſaid that Stoke was within the Juriſdiction of Guilford, and by the Court, Windham abſente, it was held a good Exception, and quaſht.

Whally

Whally *againſt* Anderſon. Ante.

BIgland prayed till Wedneſday next to argue the Special Verdict which Jones for the Plaintiff oppoſed, becauſe it hath been a queſtion, whether the Lords have forty, or only twenty days before each Seſſion of Parliament, and they had ventured to proceed notwithſtanding they were ſerved within the forty days, with a Writ of Privilege of my Lord of Newcaſtles, but that Wedneſday would be within the twentieth, which they durſt not venture: But by Keeling, they have no ſuch Privilege of forty or twenty days; but Windham doubted; however the Court would give no farther day. (5) Parliament.

WIlliams prayed a Prohibition, on 1 Cr. 531. & 595. and Anderſon 279. becauſe though the Engliſh Bill in the Marches be proper in nature of a diſcovery, what Mony was won or loſt at Cards or Gaming, by way of Trover and Converſion, he agreed the Bill good, and the Examination of Witneſſes to preſerve their Teſtimony; but they proceeding not by Jury, having aſſeſſed Damages, though it be within their Juriſdictions, yet being not within their Juriſdiction by the Common Law, their Inſtructions are not ſufficient: But per Curiam, they will not overthrow their courſe upon a motion, therefore would make no Rule. (6) Walet.

Siderf. 258. pl. 3. Johnſon *againſt* Pie.

IN Action upon the Caſe againſt an Infant, who being 20 and ½ and appearing to the Plaintiff to be of full age, did falſly and fraudulently affirm himſelf to be of full age; and as of full age ſeal'd a Deed of Mortgage to the Plaintiff, which he after avoided for Infancy, to his Damage: On Not guilty pleaded, and Verdict for the Plaintiff, and 300 l. Damages, and Judgment ex motione Jones ſtayd, Winnington prayed Judgment; but Windham abſente, the Court would do nothing: But by Keeling, the Judgment will ſtay for ever, elſe the whole Foundation of the Common Law will be ſhaken, for this was but a ſlip, and he might have pleaded his Minority here. (7) Enfant.

Siderf. 258. pl. 4. Wilkinson *against* Richardson. Ante.

(8) Tyths. THe prescription, to pay Mony as well for the Copihold Rent as for Tyths cannot be good, because the Parson cannot Libel for the Rent, nor the Lord for the Tyth; and though the Parsonage be united to the Manner now, yet it may be separated, & non constat. what each should have, therefore Pemberton prayed a Consultation, which the Court fully concurred to grant, as well for the former reason as for that, Boltonfield on 3 Cr. 587. cannot be intended Parcel of the Copihold, as it might have been of the Mannor in such prescription by the Lord: Also, per Curiam, the person must have a satisfaction, else no prescription can be in discharge; and here its uncertain what the Parson shall have: Also, by Keeling it doth not appear this is Copihold: Also, by Windham all appropriations are preternatural, and the Church during such time is in Bondage; and therefore by presentation is made presentative. Also by Twisden the Plea is pregnant, that the Manor and Rectory were time out of mind held simul & semel, for he should have said, They are and were always so held, for else, though they were so held anciently, they may now be severed: Also the Lease hereof is not said to be by deed, which being on demurrer to the Prohibition, is ill. Consultation Awarded.

Worrall *against* Brand. Ante.

(9) Abatement. Siderf. 259. pl. 5. JOnes now prayed Judgment might be staid after Imparlance, and Issue in Action upon the Case by two Executors, on promise of the Testator; one of them dyeth, which by Jones, abates the Writ, this Action being founded on Contract, as Debt or Account, which must be brought against all concerned, being intire, 40 Ed. 3. 26. b. pl. with which agrees 50 Ed. 3. 7. pl. Brief, F. 263. 344. And for Authorities in the Case of Executors, Pl. Com. 186. b. is express in Debt on Obligation of the Testators against two Executors, 37 H. 6. 16. 10 H. 4. 18. But where the Action is grounded on the wrong, death of one shall not abate it. Pemberton for the Plaintiff contrà, 50 Ed. 3. 7. was where one Executor was dead before the Action brought. Also Pl. Com. 186. is only Plowdens Judgment, but nothing appears by the Book, 1 Cr. 308. But Tiffins Case is express, that one of the parties death doth not abate the Writ, 41 Ed. 3. 3. & Respondre, Br. 4. is of the same Opinion in Account, that one shall answer; and there is no difference

ference between Treſpaſs and Contract: Alſo the Plaintiff can have no other Action, nor better; alſo Utlary of one is but as a death: Alſo 37 H. 6. 16. muſt be intended, if the party will plead it; and here the death is not pleaded, but only ſuggeſted by the Plaintiff on the Roll, before the Venire facias Awarded, which was only againſt one, and no notice taken thereof at the Niſi prius, but where they are Plaintiffs, and there be no Summons and Severance, Read *againſt* Redman, their Writ ſhall abate; not ſo of Defendants, in perſonal Actions.

1. Keeling held this different from an Action brought generally againſt two that are not Executors, for there is quaſi ſeveral Contracts, but here is but one; and the Repreſentation remains ſtill as well as before: Alſo by proceeding againſt one, there is no prejudice to any: Which Twiſden and Windham agreed, and there being no expreſs Authority to conclude the Court, they will conſider the reaſon of the point; and they doubted, this being not urged by the Defendant, nor relied on to abate the Writ, but proceeded after to Trial of the Iſſue, that this is but a dilatory, and no Abatement in Fact, unleſs pleaded.

2. Windham ſaid, the Judgment may yet be given; Keeling ſaid, he took the Rule to be always, That an actual abatement was when any thing appeared on Record, howſoever it be by Suggeſtion or Iſſue or as amicus Curiæ; but the Writ was only abatable when the matter alledged doth not appear on Record, but is dehors: Wild for the Plaintiff offered to go to new Trial, if the Defendant would agree to mend all, and try this Term in London; & Adjornatur to conſider thereof.

Endictment Fitzh. 28. The King *againſt* Glover. &c.

PAulet, on 8 H. 5. 8. pl. 4. oppoſed an Amendment becauſe though it may be by Venire facias to the Coroners to come into this Court, being in the ſame County where the Inquiſition of ſelo de ſe was taken, yet when they are in different Counties, there goeth, as 2 Ed. 3. 1. pl. a Writ to the Sheriff to ſend a better Enqueſt, and the like is unto the Coroners 2 Ed. 3. 18. if they have any, for they muſt return what the Jury find; and this caſe being taken in a foreign County, he prayed there might be no amendment; Sed Dolbyn contrà, theſe amendments being done by Rule of Court, and not in parts material; the Inquiſition being taken on the (10) Amendment.

view of the Body there dead, and so the not saying afterwards, (of which said Drowning he afterwards there instantly dyed; and so was a felo de se) is but what was before, and in Common understanding of Jury was shewed; and the Coroner is sufficiently informed, which Twisden and Windham agreed: But by Keeling, this is the point of the Action as a Conclusion of (& sic J. S. Murdravit) which must be answered, and nothing shall be taken in such Criminal Cases by Intendment, which the others agreed, when the Inquisition is return'd; but here if the Notes taken by the Coroner be sufficient to warrant such an Enquisition, its well enough, as the Clerks of the Assize Notes of a Verdict: But on reading the Enquisition, it was & sic voluntarie & felonice seipsum murdravit & interfecit, wherefore all agreed, that the saying (whereof he dyed) is but form; And per Curiam, and the Clerks, forms may be amended here by Coroners of any County in England, but not substance, and so is the Course.

Rogers *against* Marshall. Ante.

(11) Trespass.

IN Trespass of Assault, &c. the Defendant Justifieth by Process out of Pallas Court, in Trespass upon the Case by Plaint there levied by one Cade, for that there was a Pone per vadios returned nichil, and thereupon a Capias, by which the Defendant took the Plaintiff here at Barnet: And to this the Plaintiff demurs, because its not specified what Action, whither Assumpsit, &c. which by Pemberton is needless. 2. The Process is F. N. B. 92. in all Actions upon the Case, Pone, and not Summons. 3. The Letters Patents by vertue of which the Court is held, need not be shewed by the Defendant, being but Baily, on 10 Co. Dr. Leyfields Case, as 26 H. 6. 42. of Subcollector; and 36 H. 6. 14. so of Undersheriff, they having no interest in the Patent, nor can command it. 4. Its not said of what Sum the Plaint is, nor where the Arrest was, therefore the Court is not entitled to Jurisdiction, which is needless, being Court of Record; and Plaints there are not levied to any Sum or Damage, but shall be intended of greater, till the contrary appear, as on Conusance demanded. Also the place of the Arrest must be Traversed on the other side. 5. That here no Capias lieth; this strikes at the Root and Branch of all Inferior Courts; and to say no Capias lieth at Common Law, and the Statute of 19 H. 7. cap. 9. doth not extend to Inferior Courts, is not sufficient; for the Court have, (as 10 Co. 76.) a General Jurisdiction of the Case, therefore the Officer is excused Also: The Equity of this Statute may as well

extend

extend to Inferior Courts, as Debt on escape by W. 2. but this Statute doth not give this Process, but its where a Pone is the first Process, and not a Summons: And this is evident by Originalls in Trespass upon the Case return'd here, without Vi & Armis, but as 35 H. 6. 6. pl. 22 H. 6. 13. this Statute giveth only the Exigent, & Rast. Entr. 293. and the Capias was agreed to be, and still is in all Inferior Courts; which Windham agreed, and that the Capias was a Process before the Statute, but that Process was infinite; and by Keeling they could not imprison any by Capias at Common Law, unless in Actions Vi & Armis, or at the Kings Suit: Also this Action upon the case is only Summonitus, unless F. N. B. 101. it be for a deceit: Also they ought to set forth the Letters Patents, per Curiam, or to say prædict. A. B. & C. grant also this Virtute Cujus is not Traversable, as in a Return, 1 Cr. 45. and other presidents are to be searched. Adjornatur.

Whally *against* Anderson. Ante.

Tuesday, May 30.

Wilmot for the Defendant, That the residue is certain enough, though the value be not found, as 1 Cr. Colliers Case, and 3 Cr. 449. Contrà of the 4 Resol. in Adams *against* Lambert; for there the residue was not disposed over, as in this case it is, therefore shall be presumed of greater value, being not found Less; And the Mortgagee ought to have proved the Land was not worth his 200 l. per Annum to entitle himself wholly to it: Also no Ejectment lieth against the Kings Title: Sed per Curiam, a Rege inconsulto is in nature of a Prohibition, and lieth not after a Verdict. Windham agreed, that the residue being for the provision of the Wife of person Attainted, shall be presumed on a Verdict; and though Edward Whally could not by Subpena have had the Trust executed and drawn out of Springat, yet as he that hath the residue after the first vesture, hath enough to denominate him owner of the Land. Twisden, Hub. recites that Sir John Dackans Case was, that a Trust was not forfeited, was not resolved, and in Hollands Case Stiles the Land is at this day enjoyned against the King, and the Alien also by the Tenant then in possession; but in our case Trusts are expressly forfeited, yet no otherwise then in the party who hath none but an equitable right to redeem, which Keeling agreed clearly. Windham said, If a Lease were made in trust for Edward, paying 200 l. per Annum out of it, Edward might have compelled

(12) Treason. Siderf. 260. pl. 8. 2 Cr. 114. pl. 12.

pelled the Execution of the Eſtate, but now here Edward Whally was not truſted to pay his Son, but Springat.

Adjornatur.

Siderf. 260. pl. 9. Opie *againſt* Thomatius. Ante.

(13) Powers.

IN Ejectment on a Deviſe of Aſhborn, Special Verdict find, that Rous Father and Son ſeiſed in Fée made a Leaſe for 99 years to T. if three ſo long lived, and after by Indenture between A. Rous, there was a Covenant to levy a Fine of the Reverſion to him for Life, Remainder to Ambroſe, R. and Remainder to William Rous, Proviſo, that it ſhall be lawful for A. or any of the Remainder, to make a Leaſe for one Life, or 20 years in poſſeſſion, or Reverſion, or for any number of years, not exceeding three Lives, or determinable on one, two or three Lives; they find the Fine levied, and the death of Anthony, and Ambroſe; and that William deviſed to John Thomaſius before the Expiration of the former Leaſe, the former Lives being then living; and after conveyed the Inheritance to Opie by Fine, who made a Leaſe to the Leſſor of the Plaintiff. The Points therein are. 1. One ſeiſed in Fée of Lands, partly in Leaſe, ſettles as aforeſaid, Whither he may make a new Leaſe, whiles the former Lives are in being: And Jones for the Plaintiff, conceived they could not, 6 Co. 33. Wraths Caſe, in that generally the Law doth reſtrain ſuch Powers to poſſeſſion, with which agrées, 3 Cr. 5. which is intended an Actual poſſeſſion, not ſuch as is ſo pleaded as of Reverſion, which is quaſi ſo; for all the Inſtances in the Powers of this Déed, are, that none ſhould exceed three Lives, and this is but a ſtretch, and Conveyances muſt enſue vulgar Spéech, as a Bond made payable the firſt day of the Term, is intended the 4 die Poſt. 2 Cr. 318. Hawkins Caſe, is in terminis with our Caſe; and adjudged a void Leaſe: The ſecond point is, Tenant in Tail of a Reverſion expectant on Leaſe for 99 years, makes a ſecond Leaſe before the Expiration of the former; And after Iſſue in Tail levieth a Fine, if his Conuſée may avoid it, being not only voidable but void, as appears by the Statute de donis Cond. for though the Donée cannot alien to the prejudice of the Iſſue, yet for his benefit he may, as his grant of Rent-charge, or Leaſe without Rent, Pl. Com. 436. 12 H. 8. 8. are ipſo facto void by his Death, being an apparent prejudice to the Iſſue in Tail, and no appearance to his advantage; And ſuch Leaſes in futuro are as apparent prejudice to the Iſſue, who cannot alien nor Leaſe till the former be expired, 6 Co. 41. 1 Inſt. 223. the Tenant

ail cannot be now restrain'd to Lease for Lives, be-
Law giveth him this power, but the restraint had
on the Statute of Donis. 2. This Lease by way
Interest, doth not change the Land into possession,
ascends to the Issue, as Sir Anthony Mayns Case,
neth, that hinders no uniting or executing of E-
ing no part of or Estate in the Land, till executed,
Griffins Case, Lease by Tenant in Tail, to begin
Death is void, Dyer 279. pl. by Manwood, Te-
ail cannot make a Lease to begin in futuro, especial-
Tenant in Tail dye, as in our Case before the Lease
. Though the Lease were only voidable, yet the
ath the same power to avoid it, as Pl. Com. 437.
re, so in Case of a Feoffment, which cannot be
om a Conusee; Those Cases that are objected out
, not hing resemble ours; for Lease by Tenant, and
s, before the Statute of 27 H. is a discontinu-
the Lease of him, and Confirmation of the Feof-
navoidable by the Issue, there being no remitter
at in Tail, as Amye Townsends Case, Pl. Com.
first taker: Also Croker *against* Kelsea in 2 Cr.
tle to our purpose, for that was, Baron & Feme,
Tail, have Issue, and after his Death the Is-
Fine, whereby the Tail is gone, and therefore
all not avoid Lease made by the Feme in her
wards, in that the Issue could not have avoid-
it Death of the Feme. Winnington for the Defen-
is a Covenant by the Issue in Tail against in-
which particularly excepts the Lease in question;
agreement to be to have only three Lives out at a
time one party stiled, and the Lease in question is for
years nable on one Life, in C. B. Hill. 12 Car. 2 Rot.
1586. Charles Howard Leased the Mannor of Clum
for a and after setled it to himself for Life, with di-
vers ers, with power, as this Case is, that any one
possessed freehold might Lease for three lives, or 21 years;
here it dged in C. B. that this was a good Lease; and
Slocom Hawkins Case 2 Cr. 318. is reported by Yel-
verton different manner, that the second Lease was
made by that had the Freehold in possession. 2. This
Lease is if not pursuant to the power, only voidable
by the and therefore Conusee cannot avoid it, Pl. Com. 434.
is direct this point, and the whole Argument had been
else to no purpose; 1 Inst. 46. Dyer 279. is but only Opinion,
Carline Manwoods opinion, and there is a difference,

where

where the thing it self is granted; as by a Lease, as Hutt. 102. and where only something out of it as a Rent. 3. Its become absolute by this Fine, for the Issues are only enabled by the Statute de Donis to elect, for before he was bound post. prolem, &c. and the Conusée cometh not in privity of the Estate Tail, but in the Post, and he cannot claim an Estate Tail by a que Estate, 7 Co. 9. doth expound the reason of Dyer 51. to be, because such Lease was only voidable, which the Court agreed, this being a present Lease in possession; but here the Issue could never Elect, yet his alienée shall not have more power then the Issue had, else should Tenant in Tail make such Lease in futuro, and Conusée avoids it, and after the Fine be reversed for Error, the Issue would, as Dyer 263. pl. be at great Inconvenience.

1. Keeling held the first the main point, in that all did see the charge of a Lease in being, and this power ariseth out of the settlement, which was intended to have some effect, as Sir Robert Hawards Case inter Perry *against* White; but certainly Lease in futuro by Tenant in Tail, cannot be void, but yet Conusée shall have the same power as the Issue had, this power being in futuro; also the Case of the Feoffment is as strong as a Fine.

2. Windham said, had the words in possession been left out, the Case had been strong against the Plaintiff, the settlement being of a Reversion; but such power on a Settlement in possession must be intended also in possession: And Dyer 357. pl. the Judges agreed, that on such general power, a Lease in futuro was good, the thing to which this power is annexed being a Reversion; and there is a great latitude to be given to these powers: Also the words in possession, will not make much alteration. 2. Lease by Tenant in Tail without Rent, is not void, because Election is beneficial to the Issue; so of Baron & Feme; so of Lease by Tenant in Tail, to begin after his Death; and if Tenant in Tail Covenant to stand seised to the use of himself for Life, Remainder to others, this hath been void; but the Law is otherways now; also here the Issue never had any Election.

3. Twisden agreed the Lease but voidable, the Tenant in Tail having an Inheritance; so if there be Rent, or not, the Issue hath Election; but the Conusée cannot have this Election, for the Estate Tail is Barred, and matters of Election are not transferrable: Shellyes Case was argued till by an Old Womans death, on whom the matter depended, it fell.

Adjornatur.

Coram-

Cornwallis *against* Gavill.

Wednesday, May 31.

The Plaintiff being a priviledged person, the Kings Servant, brought an Action against the Defendant for a Battery, for which the Defendant also would have sued the Plaintiff, and took out Process against him; but he stood on his Priviledge, and the Chamberlain would not give leave to sue him, therefore the Defendant prayed the Plaintiffs Suit might stay against him, unless he would appear to the Defendants Action, being cross Actions in the same Court, and only for a Battery, which the Court granted; but if it had been debt, or such like, they would not stay one Suit for want of Appearance to another. (14) Priviledge.

Mounford *against* Pate.

Jones on the Statute of 23 H. 8. cap. 15. prayed that the Plaintiff, in forma pauperis, might be discharged of Costs, there being none at Common Law, and Paupers thereby discharged. Twisden said that Justice Jones said, That unless the Pauper would submit to be whipt, he must on Nonsuit pay Costs: But by Jones, this was Trover for Bonds, and it did appear there were Bonds taken away, but the dates were not known, therefore thereupon he was Nonsuited, and it's in the discretion of the Court to consider whether the Suit were veratious, or not, and accordingly to inflict their punishment. The Court agreed with Twisden, that the continual practice being to assess Costs, the Plaintiff must pay them, or submit to be whipt at Election (15) Poor. Siderf. 261. pl. 10.

Johnson *against* Pie. Ante.

Trin. 16 Car. 2. Rot.

Winnington prayed Judgment in an Action upon the Case on communication of lending 300 l. and that the Def. was therefore to Mortgage certain Lands; and the Defendant affirmed himself to be of full age, and so intending to deceive the Plaintiff, and being in appearance a man, and avers he was twenty and a half; the Defendant pleads Not guilty, and there is a Verdict for the Plaintiff, Pasch. 16 Car. 2. Rot. 401. Grove *against* Nevils Case, in this Court is the nearest to this. (16) Enfant.

on deceitful affirmance of a Stone that was but Bristow, to be a Diamond, and his own, There on demurrer Judgment was against the Plaintiff, because it was matter of contract; but this a cheat and a tort. Keeling said, such torts that must punish an Infant, must be Vi & armis, or notoriously against the publick; but here the Plaintiffs own credulity hath betrayed him: Also by Windham, the commands of an Infant are void; and for such he shall never be attainted a disseisor, much less shall he be punished for a bare affirmation, which Twisden agreed, and that there must be a fact joyned to it, as cheating with false Dice, &c. Also by this means all the Pleas of Infancy would be taken away, for such affirmations are in every contract. Windham said, That had any other person affirmed the Infant of age, an Action would lye (the Case of Grove and Nevill, the Defendant pleaded Infancy, to which the Plaintiff demurr'd in an Action upon the Case, for falsly affirming a Jewel to be his own, which was another mans) the Court awarded on the Plaintiffs prayer a Nil Capit per Billam.

Winne *against* Lloyd. Ante.

(17) Costs. IN Error of a Common Recovery, Williams for the Defendant, on affirmance of the Judgment by 3 H. 7. cap. 10. prayed his Costs, though none be due in the Original Action, as Co. Entries 162. on 2 Ed. 6. in debt for Tythes, and 3 Cr. Graves *against* Short in a Formedon, and 3 Cr. 659. Penruddocks Case, in Error on a quod permittat, there being as great mischief by delay, as in delay of Execution, and here in Common Recoveries there is no real Execution done, which Keeling agreed; but this is the reason why here the party cannot be said to be delayed no more then in Error brought on Judgment after Execution: Also by Windham, this is intended only in Writs adversary, not common Assurances, as this is taken here to be; and by Twisden, the Record saith Execution is done; and though this be but private Entries among the Attorneys, yet appearing on the Record now, the Court cannot say contrà; but they agreed that where Execution is delayed by such Error, Costs are due, though no Costs be given in the Original Action.

Lowe

Lowe *against* Berdmore. Ante.

Thurſday, June 1.

Will prayed the Opinion of the Court in an Action upon the Caſe for Indicting the Defendant for a Reſcous, well knowing that he was not preſent at the time of the Reſcue, and the Jury have found it malitioſe. But by Powis for the Defendant, This is but the Common Form, and this ſounds not in Slander, as in the Caſe of Langly *againſt* Clerk, an Action for indicting him of Aſſault made with intent to raviſh the Defendant; and in the Caſe of Preſcot *againſt* Chamberlain in Newdigates time in B. R. it was held, that an Action lay on Indicting one Joyntenant for falſly ſuing in the others Name without his conſent; but this Judgment was reverſed in Error, and the common Opinion of later time hath been, that it lyeth not, and ſo the Court inclined; and this lyeth properly in the diſcretion of the Court, before whom the Cauſe was tried, if there be probable cauſe, as that there was a Reſcue, and any perſon like the Plaintiff; but if there be no ſuch cauſe, then conſtantly the Plaintiff is Nonſuited. Alſo ſuch Indictments muſt be ſworn, and it's a Proſecution for the King, therefore more to be countenanced then this Action. Twiſden alſo conceives the Count ſhould be ſpecial ea intentione, and with deſign of Revenge, &c. Alſo by Keeling, this Indictment is not only the Proſecution of a ſingle perſon, but the Oaths of a Jury, and therefore unleſs ſome practiſe or deſign of Lucre appear, theſe Actions are always diſcountenanced, in that elſe all Preſentments would be diſcouraged, Marches Rep. Adjornatur. (18) Conſpiracy. Siderf. 261. pl. 11.

Jemot *againſt* Cooly. Ante.

Trin. 16 Car. 2. Rot. 481.

In Ejectment the Plaintiff declares on a Leaſe of Sir Ralph Bovey, Special Verdict find Drake for 6000 l. granted to Sir R. B. a Rent-charge of 400 l. per Annum, to him and his Heirs, payable in January and July, and that if the ſaid Rent be behind, that then he might enter and retain the ſaid Land to his own uſe, until he were ſatisfied and paid the ſaid Rent, and that for Rentarrear the Leſſor entred, and demiſed to the Plaintiff, and if for Plaintiff, for Plaintiff, &c. (19) Rents. Siderf. 262. pl. 12. Debt, Fitzh. 136.

1. Jones for the Plaintiff, It's not now before the Court, whether this Interest be a Fee, a Freehold, or a Chattel, because Sir Ralph the Grantee makes the Entry, and not his Issue or Assignee: But the only question is, whether that of this Interest the Plaintiff may have Ejectment; and on Litt. Sect. 327. I think he shall, as well as Feoffee, for on Entry on Condition broken the whole Estate is avoided, and therefore this Interest is a Chattel, 1 Inst. 217. or in the nature thereof, created by agreement of parties: And though Litt. doth not put the Case to be by Deed Indented, yet it must be so intended, else no Rent can be reserved since the Statute of Quia emptores, 1 Inst. 143. it's holden a Rent may be reserved by Deed-poll, but Dr. & St. 74. 11 H. 7. 22. & 14 H. 7. 36. are contrary, because such Rent is the Grant of the Feoffee, and so is this Entry also: And also it's granted as a penalty annexed to the Rent on the profits of the Land, and always ensues the Rent, as 2 Cr. 510. Havergill *against* Hare, after grant of a Rent, there is a Fine levied of the Land, if the Rent were behind, to the Grantee and his Heirs, this can be no contingent Use, as it must be if it were a distinct Estate by it self, therefore it's annexed to the Rent, and created by agreement of parties, and doth go along with it, else the Grantee having assigned over his Interest before any thing was arrear, the Use would have been destroyed: And although by reason here the words be, That the Lessor and his Heirs may enter, yet this gives no Estate, but only sheweth that the remedy shall so long continue, Hill. 13 Jac. Rot. 868. in C. B. Brown Lessee of *against* Haggar in Ejectment on Special Verdict, Rent granted out of Land, as in our Case, in dispute between the Heir and Executors, it was adjudged that this Interest is a Chattel. 2. That it's such a Chattel whereof the Lessor may make a Lease, in that he hath an Interest till the duty paid, which is incertain, yet so is the Interest of Tenant by Elegit, yet continual experience shews he may make a Lease; So Mich. 1657. Harrisons Case, and in C. B. the Countess of Pembrokes Case, of Tenant-right, that the Lord by Custom may enter until the Fine were paid, and adjudged that this was a sufficient interest to maintain an Ejectment: So Lands given to Executors for payment of Debts, they may Lease. I agree that Livery were needless in the Case of Accruer in Litt.

2. Thirsby for the Defendant, That for want of Execution of this Deed the Grantee is only Tenant at will, for Lit. Sect. 380. Estate to Baron & Feme during the Coverture is an Enumeration of Estates held a Freehold: So 37 H. 6. 26. Tenure dum sola, or Quam diu se bene gesserit; and 4 Co. 30.

Estate

Estate durante viduitate must be intended for life, for less it cannot be, Leases, Br. 76. Per. Br. 462. so of Lease till 100 l. be paid, Per. Br. 463. & 468. no Livery appears whether made or not, 14 H. 8. 10. per Brudnell, 8 Co. 96. Mannings Case, though such Estate may be created by Devise, 3 Cr. 315. 3 H. 7. 13. yet 4 Co. 82. 1 Inst. 42. and the Bishop of Baths Case by Grant it cannot be; also the reason of Law is, that it can be no Estate, for else it would be a perpetual Chattel, and Yelverton 258. Green *against* Edward, that is held void; but such Estates may be created by Statute, as on the Elegit: Also as 10 Ass. 8. such things as lye in Grant, 17 Ass. 7. this is as sufficient to pass a Freehold: So 8 H. 4. 17. Grant by the King Quam diu in propriis manibus, &c. for no other Ceremony or Livery is necessary to Execute the Estate: But the Case at Bar is a Grant of Land, which must have some Execution, unless in cas[illegible] a Will, as before, 44 Ass. 3. Pl. Com. 524. Bar 280. Done [illegible] open the reason of Lit. Sect. 327. That this is only a Pa[illegible]ge, not any Estate, which is suffered, least the whole Estate should be defeated by the Entry on the Condition: And they that have the Fee may restrain it to a less Estate. A Grant to distrain Goods irreplevisable is void 1 Inst. 146. but on Feoffment in Fee by Condition, that if Goods be replevied the Feoffor may enter, it's good enough; and though Tenant at will may make a Lease to try a Title, yet not against his own Lessor. Also it's here expressly found, that the Grantee entred by command of the Lessor, so the Will is thereby determined. Windham said Littletons Case is good Law; and that the Rent is created by Grant of the Feoffee, but more properly by Reservation of the Feoffor for Assurance, and making good by the Livery what was granted by the Feoffee; nor hath this been doubted on a Feoffment to Uses, which is used in Conveyances on death of Issue Male, to put the Lands in the hands of Trustees till Portions raised; but of later times this way of Grant hath been used, as in this Case, which hath in all times been a doubt, whether it can create such an Estate; and the difference usually taken is, that when the Grant is in consideration of Mony, the Land on Non-payment will come by way of Use, so on Grant of such Rent to his Son, with Clause of Re-entry, this on the strength of natural affection on Non-payment will become as a Covenant to stand seised; but a voluntary Grant, as to my Servant, &c. would not be sufficient to pass any Estate in the Land. Keeling said he was more satisfied with the Authority, then with the Case of Litt. Sect. 327. and if it were a new Authority, it would be of little weight; for as he in Remainder is subject to all the terms contained

tained in a Lease, to which he never sealed, so here he hath a modus tenendi only, for in all the former Cases, the Estate is but a Chattel, and shall go to the Executors; therefore it will be difficult to shew how the Consideration of Affection, which is to the Heir can raise an Estate to the Executors, who are Strangers: Windham agreed this was impossible, but this will enure as a Covenant to stand seised to the use of his Son, and his Executors; and the Son hath the whole Estate: But in the Lord Pagets Case, the Covenant was immediate to the use of the Executors of the Son; Twisden, This power of Entry is given to the Grantee, and his Heirs; and therefore the Estate must go in the like manner, therefore if it should be a Covenant, it must be enrolled.

Adjornatur.

Sid. 269. pl. 13. Pledall *against* the Inhabitants of Thistleworth.

(20) Freshfuit

IN Action upon the Case, on the Statute of Hue and Cry, which is in nature of Debt; but the Damages being the principal and without loss, no Action lieth on the Robery, therefore is like Trover, and being de uno mamillari & manicas lynteareas Anglice, a Gorget and Cuffs: This by Jones for the Defendant in Arrest of Judgment is uncertain, as Trover de virgis & velis, Clerk *against* was adjudged ill, the certain number not appearing: So by Twisden of a Dublet and Breeches Adjornatur.

Lydeat *against* Butler. Ante,

Pasch. 16 Car. 2 Rot. 378.

(21) Slander.

IN Action upon the Case for words spoken at several times; The Defendant pleads that the words laid in the Declaration were not spoken within two years last past, to which the Plaintiff demurred for the incertainty, specially because its not said, which words were before; and if the Jury find any of the words before, its against the Plaintiff: And Keeling inclined, that this is a good Issue, as well as Non Assumpsit, pleaded generally where several promises are in the Declaration: But by Twisden and Windham this is a good Issue, contrà that the promises in the Declaration were not within that time: Its true, the Jury are not bound to find any of the words more then the Issue: on non debet in Debt for 10 l.

10 l. without saying nec aliquem denarium inde, the Jury are not bound to find less, but may find only 5 l. due.

Sed Adjornatur.

Marke *against* Johnson. Ante.

Hill. 15 & 16 Car. 2. Rot. 515.

JOnes prayed Judgment for the Plaintiff, in that the Verdict concludes on a special point, That if the Lease be void by Non-payment without Office, then for the Defendant, &c. so 21 Jac. cap. 25. cannot aid this, whither it be within one Clause or the other, for if it be void at Common Law its so now: The Court agréed the Lease to be void at Common Law, but by this Statute his Leases have continuance against the King, to the intent the party may tender till Office found: But by Jones, the King may enter as well as have an Office found; And if he had enter'd, the party could never tender afterwards; but there being no Title appearing, the Court cannot intend a Title by tender, &c. Also special Verdict, unless Title be for the Plaintiff, is not sufficient for the Plaintiff: But by Keeling, there is no advantage shewed to be taken of this forfeiture; and therefore it continueth, which Windham agréed, contrà by Twisden: And also had there béen a grant over by the King, it would be intended he enter'd, and may be void without Office for the King, or it may not be void if no advantage were taken: Therefore by Windham and Keeling a Venire facias de novo ought to go, because the Verdict is not sufficient. Adjornatur. (22) Patents.

Marke *against* Guilbert.

Friday, June 2.

LIndly prayed a Prohibition on Libel for a Mortuary by the Vicar, Suggesting that he had paid it to the Impropriator, who ought time out of mind to have it: But by Keeling and Windham, this being in dispute only between the Parson and Vicar, no Prohibition lieth on 21 H. 8. cap. for this enacts nothing de novo, but leaves Mortuaries to be paid as formerly; and they being originally suable there, the Incident question of Property shall not alter the Jurisdiction, especially between the Vicar, who is but as Tenant at will of the Parson, and the Parson, which Twisden agreed: And by Windham, this is like Tyth fish, where if payable its Tyth, (23) Prohibition. In Disms Br. 11. Siderf. 263.

Tyth; but if the Defendant will suggest that by Custom he payeth none, that shall be tryed at Common Law, 1 Cr. 237. the Archdeacon of Chesters Case, the Judges were divided, which Keeling agreed, but Twisden doubted, being a prescription in non decimando: But by Windham and Keeling a Mortuary was due of common right at Common Law, without any prescription, which is, secundum melius Animal, after the Lords Heriot paid.

Thacker *against* Ullock.

(24) Patents.

IN Trespass, the Defendant justifie as Servant to this King, to whom the Lands discend from King H. 8. to which the Plaintiff by Replication confesseth them in H. 8. but saith that H. 8. granted to the Plaintiffs Auncester; and doth not traverse absque hoc, that the King, Car. 1. dyed seised on the Case of and Fitzherbert, Hub. The Defendant rejoyns that Thacker the Auncester granted to J. S. and so conveys under him to the Defendant, to which the Plaintiff demurred, as a clear departure, which the Court agreed; But if the Replication be ill, the Plaintiff cannot have Judgment; And Windham said, this being Fee may be gaind by wrong; and so not like Heliars Case and the Plaintiff hath not answered the whole Title of the King, therefore on Dyer 107. pl. the Plaintiff ought to take a Travers, which Keeling agreed, but Twisden doubted, and being but a trivial Action against three Schoolboys, for playing in a Courtyard near the School, where of long time they used so to do, Adjornatur.

Siderf. 264. pl. 15. Brewen *against* Rowe. Ante.

(25) Taxes.

WInnington insisted on it, that being found that the Defendant was an Officer, and seised Goods on suspition, that Custom was not paid, Da. 8. a Surveyor having Color so to do, though it be found that the Duties were really paid, yet not being found he knew thereof, this demand, on 10 Co. 47. is no sufficient Conversion to charge the Defendant in Trover. 2. The Condemnation in the Exchequer, though the Certificate of payment be necessary, yet doth bind the right till taken off, being a Judgment. Polyxphen, The Verdict shews no cause of Suspition: Also the Verdict finds he converted expressly to the Kings use, and his own; also the Information in the Exchequer affects not the Goods.

1. Keeling

1. Keeling said the Defendant should have pleaded specially, that he seised on Suspition, until he were satisfied the Custom were paid, but this is no Plea to the Conversion: Also the Jury have not doubted but that there is a Conversion; And the Information in the Exchequer, doth but aggravate that tort that was before committed: But if the Exchequer had sold to a Stranger on Condemnation afterwards, it would have excused him, but not the Tortfesors.

Which Windham 2. agreed, and as Sheriff must seise Goods at his Peril; and not because he suspects them to be the Goods of the Defendant: Also the seising, carrying away, and yet detaining as is found, is a sufficient Conversion of it self, which is but aggravated by the demand.

3. Twisden ad idem, This is as gross an actual Conversion as can be, as taking my Hat off my Head, which need not be demanded: All agreed that on his suspition he may keep them safe, where he seiseth them, but cannot carry them away.

Judgment for the Plaintiff.

Dause *against* Luce. Ante.

KEeling held the difference 2 Inst. 216. on the Statute of Gloc. good Law, and that the Defendant in Appeal of Waihm may Justifie; and therefore Son Assault demean is a good Plea, and it lieth before the Judge to direct the Jury according to the manner of the Assault: Whither only by lifting up the hand, or running at him with a Sword, which Windham, who before doubted, did now agree: And by Twisden this is a very good Plea as before; and the Assault must be such, as is just ground of terror, as holding up a Sword, which is only Examinable on Evidence. (26) Tresp. Ass.

Judgment for the Defendant.

Locke *against* Etherington. Ante.

Saturday, June 3.

KEeling, the Debt is discharged not by way of Pardon, but by way of Release, this being a thing Vested in the King, only as a Chose in Action, and in the same Condition, that it was in the hands of the Obligée; and so is capable of being released by the Act of Oblivion: And the difference was taken where an Office is found before the Act, of Chattels real, they are actually vested in the King, and cannot be released, as the Case of the King *against* Ward, Mich. 15. (27) Pardon. Siderf. 264. pl. 16.

Car. 2. Also felo de se cannot have Executors, and therefore the Case of Tomes *against* Etherington was, the Executors could not have this Debt: Also here need no averment that he is a Subject, for that is implied by Law, for an Act of Parliament cannot work to an Alien, but as expressio eorum quæ tacite insunt nihil operatur, but particular qualifications must be specially Averred.

2. Windham, The Case is no more then if the King before his return had lent 500 l. and taken Bond for it, be discharged by the Act of Oblivion; And its agreed, that in Case of a Lease for years, there is no discharge; and the intent of the Act was only to release pains and penalties, and Sums of Money are only as such interspersed, as what was contracted by the Exigence of the War, not to discharge real Debts, which nothing related to the times. 2. The Averment, that he is modo subditus, doth imply he was no Subject at the time, but as Caudryes Case, in Special Verdict this shall be supplied, but not in pleading; and in Action, on 2 Ed. 6. its always aver'd, as Kiffin *against* Swain, 2 Cr. 324. that he is a Subject, and this is like nuper Episcopus, which implies, he is not so now, and therefore Judgment ought to be for the Defendant.

3. Sed Twisden contrà; He agreed with Keeling, that the Debt is Pardoned or Releast, which 1 H. 7. 13. & 11 H. 7. 10 are all one in signification, so in Action popular, Br. 4. where the King pardoneth i. e. releaseth the punishment, &c. and this is to be extended as far as it may; and the constant practice of the Exchequer is to discharge whatever is not within any of the Exceptions, as Recognizance, Statutes, &c. 2. There need not be any Averment that he is a Subject, but the disability must be shewed on the other side; and whoever live here, being under the Kings protection, are generally Subjects, and so within this general Qualification, for as Hub. 207. they are capable of such Pardon, being local, though not natural born Subjects; and its a strong presumption that every Man that is in England, is a Subject; and therefore in Actions at Common Law brought by any, its intended they are Subjects prima facie; and therefore if they be not so, it must be shewed on the other side; and this is the reason of Dyer 329. on the Statute of Wills, and Caudryes Case, that no Averment need be that Lands were Soccage, Tr. 1649. Johnson *against* or that he that sueth is a Subject, Co. Entries 35. And it need not be aver'd that he that set out his Tyths was a Subject, nor need the Statute of 2 Ed. 6. be recited, but may better bring Debt for them,

them, and the particular value, and that the Defendant did not set them out contrà formam Statuti, therefore Judgment for the Defendant.

Dett. Br. 94. Heliar *against* Casebrooke. Ante.

KEeling put the Case, that George seised in Fee of a House in Bristow, makes a Lease for years to his Brother Samuel in Lond. who married the Defendant and dyed, she assigns, and after an Action of debt lieth against her in the Detinet, for an Executor stands in representation to answer all Contracts of the Testator; and he is chargeable no farther then he hath Assets; so there is no inconvenience. I agree Ungle *against* Glover good Law, so of the Case of Marrow *against* Turpine, but Overton *against* Sydals Case, as in 3 Cr. 553. is good Law, but not as reported in Walkers Case, for there it is mistaken, which hath deceived many; for there the privity of Contract was destroyed on both sides, but where the privity on one part remains, the Executor is chargeable, as where Lessee doth assign, if no Rent were ever accepted of the Assignée, the Executors of the Lessée are chargeable. 2. On Hargraves Case, while the Executors are in possession, they come into the Estate of the Testator; and as Assignee, therefore are liable in the debet & detinet; but after an Assignment made by the Executors, he is only chargeable in the detinet. 3. This Action is brought in London, of Lands in Bristow, which being in the detinet only, which is in respect of the contract, and trasient, may be laid any where; but Action in the debet & detinet must be brought in Bristow; but for Arrerages in the Lifetime of the Testator, the Action being grounded on the Contract, it was in resolved in the C. B. that it may be brought any where: Also, notwithstanding this Action here, an Action against the Assignée may be brought in Bristow; for using one remedy, doth not destroy the other.

(28) Administrator. Sider. 266. pl. 17.

2. Windham, This Case hath been questioned and doubted in all ages, and Walkers Case is a plain Authority of my Lord Cooks Opinion: But before that Case it was doubted, whither Lessée himself were chargeable after Assignment; and the reasons of that and this Case are all one, for the Executors may as well sever the Contract as the Testator, for the contract remains with them: Also they may waste, as the Lessée there, and then Assign it to a Begger, and so keep the Goods in their hands, and pay no body; also the mischief is the same in both Cases, the Executors are bound by the yealding and paying, which amount to an express contract, and sometimes, as Dyer 57. pl. its said a Covenant, and Porter *against*

Swetnam, resolved that thereupon an Action lay against an Assignée, as on an express Covenant, therefore the Executors are hereby bound for the Goods in their hands, as strongly as the Testator, or for any other Debt or Covenant: Also should the Reservation be of more then the Land, the Executors cannot waive it, if they have assets, for they are bound by the contract as to the detinet, though they do waive the Term; and in an Action in the debet & detinet, on Nil debet pleaded, the Executors are chargeable but only for the profits of the Land; but for the other they may be charged by Indebitatus, &c. all which shew the Executors are bound by the Contract, though they have no Land, Royston *against* Cherwin Cr. 225. Wayver Br. 49. Dr. St. 120. Latch. Hydon *against* Dudley by all with Hargraves Case hath been denied; also had the Lessée himself assign'd and dyed, the Action would lye against the Executors, as Irenmonger *against* Newman, as well where the Contract was made as against the Testator: Also in the Case of Overton *against* Sydall the whole privity was destroyed, and in the debet & detinet, there is no color to charge them after Assignment, therefore no Judgment could be given for the Plaintiff; and all the Judges have denied there was any such Opinion in the Case, as my Lord Cooks Opinion.

3. Twisden, All the former Cases and Grounds I agree, and the Executorship being intire, as Paul *against* Woody, the Executors cannot waive the Term, so House *against* Webster, Yelverton 103. and if Debt will lye, as it doth on yealding and paying in a Lease, why not as well an Action of Covenant, 2 Cr. 238. Lord Rich *against* Frank, and in the Case of Calye *against* Johnson it was held that it was well enough in the detinet; and the difference we all go on reconciles all the Books, That so long as the Term remains in the hands of the Executor, he is chargeable as Assignée in the debet & detinet, barely in respect of the profits, and so must Cooke be intended in Overtons Case; but after the Assignment he is chargeable only in the detinet de bonis testatoris, as in the Case of Stillion *against* Smith, Hutt. 79. Also as to the place, being only on the Contract its well enough here: Judgment per Curiam for the Plaintiff: Keeling agreed the Executors cannot waive, but they are chargeable still in the detinet, but they may as to the being charged in the debet & detinet; but if they take the profits, they cannot Gainsay the Reservation, but must answer for the whole: But by Twisden and Windham on Nil debet pleaded, the Contract may be apportioned in the Recovery, though not in the Action.

Worral

Worrall *against* Brand. Ante.

WIndham said 37 H. 6. 16. doth expressly agree with the Case of Woodward *against* Darcy, That the death of one Executor that is Defendant is an abatement in fact, which the others agreed; Judgment for the Defendant, which Wild Counsel for the Plaintiff, prayed for his Expedition, being the Opinion of the Court, 2 H. 4. 16. 10 H. 4. 18. (29) Abatement. Error, Br. 117.

Newton *against* Shafto.

IN Ejectment on Special Verdict, it appeared that within the Manor of Tynmouth there is a Custom, That if any Copyholder have above one daughter, it shall go to the eldest daughter at the death of the father, for her life; and that after her death it shall go to the next Heir-male of the father that can convey through Males, or else shall Escheat, and the Lands in question, as at Common Law, discended to the younger daughter, who married Wilkinson the Lessor of the Plaintiff, Da. 32. b. And by Tourner this is a void Custome, being against reason that Lands should Escheat, notwithstanding there be Heirs left, Dyer 357. Custom that Tenant in Fée shall not demise but for years, is void: So in our Case, the Auncester having a Fée, though but according to the Custom. 2. This Custom is inconsistent with and against the nature of a Fée-simple. Patents, Br. 104. 1 Inst. 43. on the same reason saith, Gift to J. S. and his Heirs males, is Fée-simple, and not Tail: So Da. 35. Proviso that Females shall not inherit is void on Grant of Fée. 3. The Lessor of the Plaintiff is here within this Custom, for the eldest daughter is found never to be possessed, but died in the Mothers life time, who held the Lands for her life by the Custom, 1 Cr. 411. Reve *against* Malster. Shafto for the Defendant, This is a good Custom, because it may have a lawful Commencement by Agreement between the Lord and Tenants, and they take the Lands with this Charge, as Custom that Copyholder shall not alien without Licence; and 2 Cr. 368. Custom that Copyholder might name his Successor: And in this Case, the Lands being in Northumberland, bordering on Scotland, whence were frequent Invasions, the Females were excluded: And this is a Fée conditional, 1 Cr. Langhams Case, ratione loci: Feme covert may contract without her Husband in London: Also this is in advancement of the Male Line, who are more worthy, and only fit for Wars and Government: Also this Custom (30) Heir. Sidenf. 267. pl. 18. P. 39 Ed. 3. 10. pl. 15. per Morris. 2 Inst. 232. 1 Bulstr. 93. pl. 76.

ſtom doth but direct the manner of the diſcent, and is not incertain at all, as Da. 32. the Caſe of Taveſtry. Alſo theſe Lands being not of their own nature diſcendible, there muſt be a Special Cuſtom alledged, Noy 3. The Cuſtom of Taunton Dean, that the Feme ſhall have the whole, doth as much deprive the Children; for if ſhe aſſigns over, they can never take any thing. 2. She only ſhall have the Land in queſtion that is Heir at the death of the Auncetter, Pl. Com. 59. b. which is the eldeſt daughter, 3 Co. Lincoln Colledge Caſe, 9 H. 7. 25. Poſtnatus ſhall never deveſt Entry for Mortmain, &c. So in 6 Co. Ambroſia Gorges Caſe, the younger Brother cannot aſſign Dower, 2 Cr. Stephens Caſe, the eldeſt Siſter is not within Cuſtom of diſcent to the eldeſt Daughter; At Common Law Seiſin guids the diſcent, but not ſo in Cuſtoms nor Acts of Parliament, as Moor 125. Keeling, The Defence cannot be the ground of this Cuſtom, for the Feme is to have it, and the eldeſt Daughter. Alſo the Males that convey by Females, is as fit for defence as the other. Windham held it's a ſtrange Cuſtom, but being of a Copyhold, it may be good enough. And in the Cuſtom of Taunton Dean the Feme ſhall have Fée, and on her death the Baron ſhall have it: Alſo the Defendant is not well entitled, in that the youngeſt, on the death of the eldeſt, in the life of the Wife, is become eldeſt, for ſhe could never here have inherited from the eldeſt, nor did ſhe ever take any Eſtate for her life: And this conſtruction is the rather to be made, becauſe it's an in-officious Cuſtom, as Civilians ſay of Wills. Twiſden alſo held it an unreaſonable Cuſtom, and Border-Service is the Foundation of all the Cuſtoms in the North.

Adjornatur.

Ranut *againſt* Kingſton.

(31) Execution. Error, Br. 55.

NOta pro Regula, Though the Bayl were not put in within four days after the Writ of Error brought, according to the Rule of the Court, yet its a Superſedeas; but the Defendant ought to pay all the Coſts and Charges of the Plaintiffs proceeding after the four days, By Twiſden and Keeling, contrà Windham, ex motione Waller for Superſedeas to an Execution, being executed after Bail put in, but only de bene eſſe, and notice of it to the Plaintiff, which the Court granted.

King

King *against* Standish.

Monday, June 5.

IN Debt on Obligation, Condition that the Plaintiff should have, hold, and enjoy Lands acquitted from all Charges and Incumbrances: And for Breach, the Plaintiff shewed that there was a Rent-charge granted by the Predecessor, under whom the Defendant claimed, which is yet undischarged. To which the Defendant demurred, because the Acquittal goeth only to the having and holding the Land; and it's not shewed that the Plaintiff was ever in possession, nor that he was charged or endammaged; to which Twisden and Keeling agreed: But by Windham, The Defendant ought to shew Coment he had discharged and acquitted from the very Rent, not to let it perpetually hang over him: But all agreed, That if the Acquittal refer to the Land it self, or to the person, the Defendant must shew Coment. Sed Adjornatur. (32) Condition. See Moor 861. in Cond. Br. 141.

Chamberlain *against* Chamberlain.

Pasch. 17 Car. 2. Rot. 635.

IN Error of a Judgment in C. B. in an Action upon the Case, Jones excepted, That being to pay the Plaintiff, being younger Son of J. C. and had paid 800 l. in Mony to take off the Sequestration of his Father; and if he would forbear to cut Tymber on the Land, to which the Defendant was Heir, as Grandchild, he would pay the Principal, Interest and Charges, which lying in the Plaintiffs knowledge, is impossible for the Defendant to know, and the Plaintiff ought to alledge notice what the Charges were the rather, because the person for whom the Mony was expended was dead. 2. The Consideration is not good, unless the authority to cut Wood given, or alledged to be given to the Plaintiff by the Grandfather, were executed in his life time, it being but a licence, and no interest, so shall not be intended to continue after his death; so he forbears only what he had no power to do, therefore Nudum pactum. Wild for the Defendant, The Jury have found that at the time of the promise, which is the same day, that the Defendant hath alledged he had Authority, that he had a power to cut, and therefore this must be intended an interest, for else he revera had no power. 2. There is a (33) Condition.

Special

Special Request to pay the Mony which he averreth he expended, which countervails notice, as Alford *against* Chute in C. B. where this very Exception was taken on Holmes *against* Hub. and resolved that the demand implyeth notice: So Mich. 23 Car. 1. Finall *against* Jeoffry, for it must be according to the duty, Trin. 23. Car. 1. Tanner *against* Laurence. But by Jones, the Breach of the promise is assigned in not paying at Mich. next after expended; and the request is not till two years after, therefore cannot imply any notice. But by Wild, the day is not material, but however, a request after is sufficient to support the Action. 1. Keeling agreed the Consideration sufficient, being but an Inducement, for he that hath an Interest hath power: Also here is a certain Breach by Non-payment of 100 l. expended, and the addition of Costs and Damages is to be valued by the Jury well enough. Windham ad idem; A licence on Consideration giveth an Interest, and is not determined by the death of the party, as a bare naked licence doth. Also Costs and Charges are here publickly expended, therefore the Defendant having undertaken to pay them, he must seek out. Twisden ad idem, All this may be presumed on Non-Assumpsit, and after Verdict. Et Adjornatur.

Enfant, F. 6. Rabie *against* Robinson. Ante.

Tuesday, June 6.

(34) Enfant. MAynard for the Plaintiff in the Writ of Error, Jennings an Infant seized in Fee, suffers a Common Recovery in person, and after levieth a Fine for years, which point was deserted; but the point insisted on is, That an Infant may reverse it during Nonage, or at full Age by Writ of Error, but it's not void; during his Infancy it's triable by Inspection, at full Age per Pais. In case of a Fine, or Statute, or Recognizance, the Trial is only by Inspection, therefore must be during Nonage, which is by positive Law, as the Cases of Bastard eigne & mulier puisne, because it hath been so time out of mind, but not any Law grounded on the reason of the thing, from which one may argue a simili ad simile, it was to create a Debt, to which the Judges were witnesses, therefore it was not to be avoided but by Inspection: So Trial of Infancy in case of Dower is by proofs, in case of death per pais. If the question be Infant, or not, if the party be of full Age, it shall be tried by pais, Bulstr. in Jac. 9. Moreton *against* Ords, 130. on 30 H. 6. 49. 5 Ed. 4. 2. 22 Ed. 4. Trial

4. Trial F. 52. 48 Ed. 3. 11. a. 20 Ed. 3. 49. 19 H. 6. 51. 9 Co. 30. all the differences were ſtated, and in other cauſes the Trial ſhould be by pais, and therefore it ſhould as well be in a recovery, and 1 Inſt. 380. Saver Default Br. 50. there is no Authority in the Law againſt this, but only Cooks ſuddain Opinion, and the Caſe of 3 Cr. 323. is poſitive for it, ſo Dy. 104. for an Infant is not bound by any Default before or after a contempt: There was no common recovery at Common Law, nor any need of it, but the uſe thereof came in on the Statute of Weſtm. 2. and binds where there is any Act of the Tenant in Tail done as a default; and therefore the ſtrict Rules thereof are not to be exceeded; and becauſe its a Common Aſſurance, is no reaſon to uphold it againſt an Infant; but the reaſon it binds, is on the Suppoſition of a right, which the Court cannot know, but that the Plaintiff in the Writ of Entry hath good right, Daux *againſt* Payton Paſch. 1650. Rot. 306. Stiles 216. Br. Saver Default 50. refers to Error, which is only that the Court, 6 H. 8. 22. Saver Default 53. would not examine whither he that made the Default were an Infant or not; but the Plaintiff holds to it, or not at his Peril: Twiſden agreed, there was no Book expreſs that he might not bring it at full age, 2 Cr. 464. Holford *againſt* Plat, an Infant may avoid any Default, unleſs it be with contempt; Account 121. by Windham, is, that when the time is parcel of the Iſſue, 12 Aſſ. 37. it ſhall be tried by Inſpection, while within Age, but after, as 9 H. 7. 2. by Huſſey of profeſſion it ſhall be tried by Jury, becauſe it cannot be the other way: Keeling ad idem, the miſchief would be very great, if this as a Common Aſſurance ſhould as ſuch bind an Infant, and the Law having appointed a Guardian for him, will not leave him without defence; Alſo Infancy may be tried by pais, as in Dum fuit infrà ætatem, which in the reaſon differs not from a Recovery; but the Court were not much moved by the Argument, de jure poſitivo, becauſe that might be urged in every hard Caſe, as well as Infants confeſſing Judgment in Court of 10000 l. Debt, but appearing in perſon is as bad as by Attorny, by Keeling. Adjornatur.

Player *against* Pettit. Ante.

(35) Trades. Siderf. 169. pl. 21.

IN Debt on By-law, that none free of the City shall set any person on work in any Manual Occupation, unless they have served seven years, and that the Defendant had set one Carter a Foreigner on work as an Upholsterer, which was not a Trade at the time of the making thereof, which was 3 Ph. & Mar. & 11 Jac. Allen *against* Tooly 2 Bulstr. 190. are no Trades within the Statute of 5 Eliz. being easily acquitted, as Hempdresser: Also part of the By-law is, that the Mayor may commit such as offend till the penalty paid, which is ill. Wild for the Plaintiff, The only question here is, whither or no this Court shall grant a Procedendo; and so whither this is a Trade or no, is matter of Evidence to be determined below by the Jury as well as here, and the By-law is of it self sufficient, and the remedy applied to it is sufficient, in bringing Debt in the Court of Record, so the Commitment by the Mayor and Aldermen on confession, be it good or not is out of Doors, therefore he prayed no Habeas Corpus may be allowed, but a Procedendo be granted, which Baldwin opposed, because the return is insufficient; And Twisden conceived this Court may judge of it, as well as London: But Windham clearly, this is matter of Evidence, and Upholsterers were a Corporation in H. 7. time; and Wild said he had seen the Charter: Keeling, Were the question only, whither the setting her to sowe Hangings were imploying her in the Trade of an Upholsterer or not, doubtless we ought to send it down, but here the question is, if an Upholsterer were a Trade or not, and 11 H. 7. cap. 19. being shewed, weighed his Opinion, that Procedendo ought to go, though he held, unless it be a Trade by 5 Eliz. it could not be so before. Sed Adjornatur.

Bayly *against* Bunning and Mawly.

(36) Execution. Siderf. 271. pl. 27.

IN Trover, the Jury find special Verdict, that one Eden became a Bankrupt, 6 June after the 4 June, which was the Teste of the Writ of Execution, but before 14 June the actual service of it, and if that be a sufficient Execution before the becoming a Bankrupt, or not, is made one question. 2. If Trover will lye against the Baily, who took the Goods by Fieri facias, on the special conclusion of the Jury, if the Goods were well taken, the Judgment was had in Tr. Term; and the 11 June the Writ taken out the Middle of the Term, and after the Man became Bankrupt, and before any Commission

miſſion, which was 17 June, the Writ was actually executed, which the Court and Counſel agreed was not ſufficient to hinder a diviſion among the Creditors: But the doubt was if it be ſufficient againſt the Execution. Adjornatur 932. pl. 41.

The King *againſt* Boſworth.

(37) Force.

BArwell prayed Bill of Forcible Entry and deteiner, found Ignoramus as to the deteiner, and Billa Vera as to the entry might be quaſht, which was done by Twiſden and Keeling, Windham abſente, the offence as charged being intire, they cannot apportion their Verdict, as the Petit Jury on Indictment may.

Portington *againſt* Fitzwilliams.

Wedneſday, June 7.

(38) Previledge.

THe Defendant being an Attorny of this Court, prayed the Action which was laid in York, might be laid in Middleſex; but the Court denied it, it being only in diſcretion of the Court, and no ſuch priviledge due to any Attorny.

Troppit *againſt* Watlin.

(39) Joynder. In Dett. Br. 5.

DOlben prayed, that in Action brought for Mony due by Bill, and Indebitatus on inſimul computaſſet, the Plaintiff might (being only on Declaration, and no farther proceeding) accept the Mony due by Bill, and a Plea to the other, theſe being joyn'd by the Plaintiff to ſave Coſts, which will not be againſt him, if either part of his Action be good; but the Court denied it, and ſaid it was never ſeen ſo to divide an Action.

The King *againſt* Executors of Summers, Ante.

Thurſday, June 8.

(40) Slander. Siderf. 270. pl. 26.

WInnington aſſigned for Error, on Hub. 62. that this is no Scandalous Libel, in that it reflects not on the Family, as to ſay He is of a Trayterous Breed, &c. Sed curia (Windham & Twiſden & Keeling) contrà. 2. This matter is not indictable before Juſtices of Peace: Sed curia contrà, as Prins Caſe here, Ante, of putting up Letter to

person tending to the Breach of the Peace, and on the same reason Barretry is by them tryed, 4 Inst. 180. There may be difference where the words are spoken to the party himself, in which Case the Heat and Danger of the Peace is over, but not so when spoken to another; but however betwéen words and writing, there is great difference, this being not only in Consequence, but an actual Breach of Peace. Judgment Affirmed, per Curiam.

Bayly *against* Bunning. Ante 930. pl. 36.

(41) Execution.

The Plaintiff being Creditor by Judgment in Debt, brings Trover against the Baily upon the Statute of 21 Jac. cap. 19. though the Writ of Execution 3 Cr. 440. Dyer 76. had béen made out the day of the Teste, it had not bound the Goods being only in Posse not in Esse; but here the Writ was taken out but on 11 June, though it be Teste before, and the Bankruptie being by Statute and Mesne, the Writ by Fiction of Law shall relate; for the Statute was intended of such Executions as were Fines, & fructus legis, as Audly *against* Halse 1 Cr. 148. the Excution must be such at least as devests the property and possession of the party. 2. The Special Verdict conclude, that if the Goods were well taken, then for the Defendant; if not, for the Plaintiff, doth not hinder, as Moor 103. pl. Lane *against* Cooper, but the Court may judge according to Law, there appearing good or no Cause of Action, as here it doth, 2 Cr. 244. Trover lieth on refusal to deliver on demand, 1 Cr. Allen *against* Chapman, 3 Cr. 195. & F. N. B. 69. though the Goods were delivered by the Plaintiff, or the Defendant come to the Goods, as here by Process of Law: Also none can share in the Dividend of Goods, but they which joyn in the Commission, which the Plaintiff did not; and if the Baily be not chargeable, he may keep them for ever, for the Defendant cannot have remedy, they being taken by Process of Law. Jones for the Defendant, The Baily is excused of taking the Goods; the time of the Sealing or taking out the Writ, cannot possibly be taken notice of; but the Execution binds from the time of the Teste, as 8 Co. 171. in Fleetwoods Case, 3 Cr. 174. but had the Execution béen Teste when it was taken out 11 June, the Sheriff must Execute it; and take the Case as it stands on the Execution, and not to return, that he is become a Bankrupt before, for then no Sheriff could execute any Writ against a Tradesman: Also the property of the Goods are not here in question, nor doth the Statute look on Officers.

1. Keeling

1. Keeling agréed, It were hard to put a Baily to discover any act that makes one liable to be after declared a Bankrupt: Also such a Return had béen naught, and there can be no Trover and Conversion against the Baily on due Execution of his Writ, 6 Co. 19. a. being the Process of the King, and for his benefit.

2. Windham held the Statute never meant to bind Goods from the date of Fieri facias, which may be kept in an Attorneys pocket, but from actual Execution; but such Goods shall be liable to an equal disposition among the Creditors; but no Act of Justice can be overthrown by retrospect, and therefore the Baily is not liable to Trover.

3. Twisden, Had this Judgment béen for Security of a Debt, it might possibly be executed, but not by Confession, for generally the Teste of the Writ doth not bind the Goods, and therefore the Goods are not well taken. And Wild the Kings Serjeant said, The constant course in London in Trespass against Sergeants and Bailyes, was only to enquire whether the party were a Bankrupt at the time of the taking, or not; which Windham agréed. Et Adjornatur.

Whally *against* Anderson. Ante.

(42) The Court, ex motione Jones, gave Judgment for the Plaintiff.

The King *against* Clerke.

Friday, June 9.

(43) Constable. Siderf. 272. pl. 28. The Defendant being Indicted for not taking on him the Office of Constable, being duly chosen: He pleaded, That by the Custom of London, all Customers, Comptrollers, and Watchmen in the Custom-house have béen discharged from bearing Office; and sheweth, that he is a Watchman; and sheweth also the Privilege under the Exchequer Seal; but doth not shew that Watchman, &c. is an ancient Officer, nor prescribes, nor doth not aver that there are sufficient to serve beside, and therefore, per Curiam, Judgment pro Rege.

The

The King *against* Wagstaff, Corke, &c. Jurors of the Old-Baily. Enquest, Br. 30.

(44) Enquest. Siderf. 272. pl. 30. COleman excepted to the Return on the Habeas Corpus, That it's said they went against the direction of the Court in materia Legis, not shewing what that materia Legis is: But by Glyn, this is a Judgment that is Returned, and the Court have a general Jurisdiction, therefore it need not be shewed why, or the particulars of it; as Estreat to the Exchequer is only pro mala Gestura. Adjornatur 938. pl. 55.

....., *against* the Executors of Maddox.

Saturday, June 10.

(45) Executors. IN an Action of against Executors, they pleaded Fully administred; which the Plaintiff accepts, and enters Judgment, and must have Scire facias when Assets happen, on Mary Shipleys Case, 8 Co. 134. But by Wild, if the Judgment be entred, the Defendant loseth his Costs, which he would have, should the Plaintiff take Issue thereon. Also in the Scire facias, whatever was in the Testator at his death, shall be presumed in the hands of the Executors, and they must discharge themselves by Plea: But, per Curiam, this is not so mischievous as the contrary would be to disallow the Entry of the Judgment; and though the practise be of late contrà, yet formerly it was, as in Shipleys Case.

Adjornatur.

Ampcots *against* Ampcots. Ante.

(46) Costs. JOnes prayed Costs in Error of a Judgment on 3 H. 6. cap. 10. in Formedon, as in Debt on 2 Ed. 6. The Plaintiff hath no Costs, but if the Judgment be affirmed in Error, he shall; which the Court agreed, and awarded Costs, Windham absente.

Travers

Travers *against* Twiſleton. Ante.

IN Debt on Obligation on Oyer demanded, it appeared the Condition was to perform an Award made by A. and B. by ſuch a day, and if they cannot agree, then to chuſe an Umpire the ſame day. The Defendant pleads the Umpire made an Award: The Plaintiff ſaith, That after that Award, the ſame day the Arbitrators did make an Award, to which the Defendant demurred: And Jones for the Plaintiff, conceived this Award by the Arbitrators void: And Twiſden on Barnard *againſt* King in B. R. it hath been agreed, Stiles 306. pl. 664. that Arbitrators may chuſe an Umpire before their time be out, but they cannot be both within the ſame time diſtinct Judges: But if the Submiſſion be to two, and if they cannot agree by the firſt of May, then to Umpire by the tenth of May; here the Umpire cannot make any Award, unleſs there be a Special Proviſo, That if they break off before, then their Umpire ſhall Award; but did agree that all being here on the Submiſſion, not by the Condition of the Bond, it's well: And by Keeling, this being to be all the ſame day, and ſo the Umpires power begins by the diſagreement of the Arbitrators, it's good. Adjornatur. (47) Arbitrement.

Siderf. 274. pl. 32. The King *againſt* Drew.

HE was Indicted for Perjury at Common Law in an Anſwer in Chancery, ſwearing he never took on him the management of the Will of old Drew, which was never charged by the Bill, as it appears on the Information; and therefore in Arreſt of Judgment, it was alledged after Verdict by Scrogs: But by Keeling in the Information, it's not material to ſet forth the particular Charges in the Bill, which Twiſden agreed, as the beſt way at Common Law: But on the Statute of 5 Eliz. the particulars muſt be ſet down, to ſhew how the Perjury is material to the Iſſue; but in the other it's only Inducement. Adjornatur. (48) Perjury.

Scot

Debt, Fitzh. 7. Scot *against* Littletore.

(49) Joynder. IN Debt on Joynt Obligation against the Survivor, the Defendant pleads, That one of the Obligors, viz. Tridderly, died, and that the Plaintiff after released to his Executor, viz. one Vesye; to which the Plaintiff demurs; and per Curiam, this Release is void; but had the Obligation been joynt and several, the Release had been good.

Judgment for the Plaintiff.

Howard *against* Spencer. Ante.

(50) In Common, Br. 9. JOnes for the Plaintiff on 2 Cr. 195. 230. & Yelvert. 104. conceived that a Commoner cannot fill up a Ditch, because here the Soyl is intermedled withal, but in 15 H. 7. 10. the taking down a Wall or Gate doth not hurt the Soil, 2 Inst. 88. So of breaking Hedge, which Twisden agreed: but by Keeling, all is one; yet it will be hard to reconcile 15 H. 7. with later Authorities; and the better Opinion is, That a Commoner cannot dig a Trench to meliorate the Ground, Rolt *against* Bugby for digging Turff in Bedfordshire, the Tenant of the Common could not have Trespass against the Owner of the Soil: And the Averment that the Commoner could not enjoy his Common tam amplis modo & forma, is not sufficient; so had he aver'd that he had not sufficient Common.

Sed Adjornatur.

Osborn *against* Crosland, Executor of Cauthorn. Ante.

Trin. 16 Car. 2. Rot. 244.

(51) Joynder. Debt, Fitzh. 51. Siderf. 272. pl. 29. IN Debt on Obligation which was joynt, on Oyer demanded it appears to be a Bond made by three, and thereupon the Defendant demurs to the Declaration; Oyer setting forth the Bond to be by three, and the Count being general: And per Curiam, had the Declaration been on a joynt Bond, the Plaintiff must aver the death of the others, or that they had never sealed: But here the Joynture appears on Oyer demanded, and therefore the Court will intend they are dead, or that they never sealed, on 28 H. 6. 3. In Debt, Fitzh. 51. & Brief, Br. 26. seu 27. & Trin. 7 Car. 1. in B. R. Rot. 1630. Lovell *against* Biggot, where the difference was taken between the Plea of the Defendant, and the Count of the Plaintiff. Adjornatur.

Winne.

Winne. Ante.

WIlliams prayed a Prohibition to an English Bill in nature of Trover in the Marches, in regard here the Damages are incertain, though a Bill, as in the Starchamber, or where the damages are certain it may lye; the Court were very unwilling, but on offering to put in the Suggestion, to which the Plaintiff may demur, or take Issue; and on Affidavit that notice was given to the Lord President and the party, the Court ordered them to shew cause why it should not go, but would stay nothing in the mean time. (52) Wales.

Andrews *against* Tanner.

IN an Action of Covenant to perform Articles, which were, That the Plaintiff should hold and enjoy Lands free from all Titles and Incumbrances: And for Breach the Plaintiff sheweth B. dyed seised, and that his Wife had title to Dower; to which the Plaintiff demurred: And, per Curiam, this Covenant goeth to the Land; and there can be no difference between a Covenant to discharge the Land of all Titles, and that the Defendant shall hold the Land so discharged. (53) Condition.

Judgment for the Plaintiff, Nisi.

Coxall *against* Sharpe.

IN Debt on Obligation, which (no Oyer being demanded) is intended a single Bill; to which the Defendant pleads an Arbitrement; to which the Plaintiff demurred: And per Curiam, it's no Plea, but inter alia a Bond may be put in Arbitrement. Yet by Jones for the Plaintiff, in such case the Arbitrement cannot be pleaded in bar of the Obligation; but the party hath his remedy on the Promise or Agreement to perform the Arbitrement, which the Court doubted: But in the principal Case, Judgment for the Plaintiff. (54) Arbitrement.

The King *against* Wagstaffe, &c. Ante 934. pl. 44.

(55) In Enquest. Br. 30.

THe Jurors being severally fined, and imprisoned till payment, as it appeared by the Return of the Habeas Corpus made by the Mayor, &c. of London, or till they were otherways discharged by due Course of Law: The Defendants offered to bring the Mony into Court, and so prayed time till the next Term: And there can be no inconvenience, for the persons are committed but till the Fines paid, and they do thus pay it under a Rule: But by Twisden, this payment must be actual, and not conditional; nor was this ever done on an Execution, unless on the Civil side, which Keeling agreed; and though the Kings Counsel should consent, they could not do it; but the Return being filed, it was excepted, that it was said in Issues joyned in Indictment of Trespass in contemptum Domini Regis, and not Curiæ; Sed non Allocatur. 2. They are said, Committed for going against direction of the Court on Issues in several Trespasses, &c. not saying perpetrat' & Commissis, but only whereof the then Prisoners were Indicted; Sed non Allocatur, this being the question then to be tried. 3. The Jury (per Curiam on Yelvert. 23. Whartons Case, and in Noy 48. Bendlows Rep. Norris's Case, which was Henego Pierce's Case) are not Judges of Fact, so as to go clearly against it. It was further urged, That it would be inconvenient that every Inferiour Court might make this Return to Fine of Jury for going contrary to the direction of the Steward, or Mayor, or Judge of the Court in materia Legis, the party, this being not issuable, would be remediless, for no Writ of Error lyeth hereon; nor is it necessary, by Maynard, for trust must be laid some where; and this contempt being in Court, cannot receive higher determination, no more then Fine by Steward in Leet. Also by Glyn, Goal-delivery is not like Inferiour Courts, for they are known to the Law, and never Return their Jurisdiction as Inferiour Courts do: Also in Civil causes, if the Jury misbehave themselves, they may be fined: Also no Attaint lyeth in this, being a Criminal cause, nor can there be a new Trial, therefore if the Court cannot fine, the Law would be very defective, which the Court agreed: This is a Judgment, and not avoidable but by Writ of Error, for the Court hath a good Jurisdiction. Also at common Law, and at this day no Bill of Exception lyeth in matters of the Crown, though the Court direct contrary to Law, therefore the particulars need not be set forth more then in Return of Judgment in Debt had

had in B. R. &c. And thus was the Opinion, they said, of all the Judges in England, and of the Kings Counsel; wherefore the Court remanded them.

Pledall *against* the Inhabitants of Thistleworth. Ante.

Hill. 16 & 17 Rot. 447.

Monday, June 12.

(56) Fresh Suit.

ACtion upon the Statute of Winton. Jones excepted in Arrest of Judgment, that Count was on the loss of a Gorget and Cuffs, which are incertain how many: But by Wild for the Plaintiff, this Action is only for Damages, and not like Replevin, which is to have Return of the thing it self, but like Trover of a Billiard Table with Sticks and Balls, not saying thereto belonging, yet held good here, which the Court agreed in omnibus, Windham absente; and it's all one with the loss of Band and Cuffs, which carries a strong intendment that they belonged to the Band, otherways if of Cuffs only, then it would be ill, like the Case de Vergis & Velis, Angl. Curtains and Curtain-rods.

Judgment for the Plaintiff.

Rachel Sanderson Executrix of Michael, Executor of Lawson.

(57) Legacy.

TOurner prayed a Prohibition to the Spiritual Court of for that in Suit there for a Legacy given by Lawson, she pleaded Fully administred, and the Court refused that Plea, as Latch. 144. Watkins's Case, and Noy 77. Goldsb. 141. Sed per Curiam, This Plea is properly triable before them, and if they refuse the Plea, the party must appear for the Gravamen, but cannot have a Prohibition on such Suggestion.

Topham, Law, and Hawly *against* Goodson.

Pasch. 16 Car. 2. Rot. 154.

In Enfant, F.6. (58) IN Trespass against three, after Judgment, Pawlet assigned for Error, That one of the Defendants, viz. Hawly, was an Infant at the time of the Plea by Attorny pleaded, which, per Curiam, is Error, as 2 Cr. 303. Marlboroughs Case: But being after Verdict, it had not been Error if one of the Plaintiffs, for whom it was, had been an Infant, that being saved by the Statute of 21 Jac. cap. Judgment reverst totally. So is the Case of Buckly *against* Symons.

The King *against* Cornhill.

(59) Peace. THe King being satisfied on search of Presidents, That there were none to bind any to Good-behaviour for the same Offence that is pardoned, nor any other Misdemanors whereof they were Indicted; therefore they discharged her ex motione Walker.

In Debt, Br. 4. Baysure *against* Lunne.

(60) Utlary. ON reading a Record in Indebitatus Assumpsit for Mony heretofore Lent: To which the Defendant, after Imparlance, pleads an Utlary in the Plaintiff since the Mony lent. To which the Plaintiff demurred, it being not under Seal; and, per Curiam, it ought to be so; but in Action upon the Case it's not pleadable after Imparlance; but here being a duty before, which was thereby forfeited, for which the party might have had Debt: The Court doubted on the Lord Gorings Case in an Action upon the Case for Mony due on Sale of Horse, for which the party might have Covenant, which was never resolved. Et Adjornatur, Windham absente.

The

The King *against* Drew. Ante.

IF Interrogatories be not material to the Cauſe depending, the Perjury is puniſhable, becauſe as to the Extravagancies, the party doth not anſwer on his Oath; but otherways as to the Bill and Anſwer. But on ſearch of Preſidents, the Court conceived the beſt way in an Indictment at Common Law, is to ſet forth neither Bill nor Anſwer. (61) Perjury.

Judgment pro Rege, Niſi.

Broomly *againſt* Daubyn.

STroud prayed the quaſhing of a Writ of Error which is directed to the Steward and Baylies, which is Returned by the Steward only: Sed per Curiam, the Record is before us: Alſo this is brought by the Bayl, quod tam in redditione Judicij, as 1 Cr. 551. againſt the Principal, Error intervenit manifeſtus, which, per Curiam, is ill, and as Souths Caſe, 1 Cr. the Bayl muſt recite the principal Judgment, and ſay only Error intervenit in the Judgment, and Execution againſt the Bayl ad damnum of the Bayl; So being contrary, it's clearly Error: But this Writ being Miſ-returned, was quaſht; but the party muſt bring a new one here, de Record quod Coram vobis, &c. (62) Error.

DE

DE TERMINO Michaelis,

17 *Car.* II. in B. R. Anno 1665.

Twiſden,
Windham,
Keeling,
} *Juſtices.*

(1) Adjornment. Dyer 225. b. pl. 35.

Memorandum, That this Term, by Proclamation 29 of *Sept.* and Adjornment by Writ on the Eſſoyn-day by the Puiſne Judge of each Court, was adjorned to *Oxford* to be held 15 *Mart. viz.* the 18 of *November*, and ſo on, which was held accordingly: And there *Keeling*, puiſne Judge, was made Chief Juſtice, and being Sworn at the Chancellors Lodging, came up privily and took his place on the 22 of *November* in the Logick School, where the Court of *B. R.* ſate, and in the ſame manner upon the 24 of *November* the *Friday* after came up *Moreton*, the Kings Serjeant, to be the puiſne Judge. The Buſineſs was only Motions, to prevent any Concourſe of People, the Sickneſs, by reaſon whereof this was removed, being ſpread into moſt Countries, eſpecially Eaſtward, whence it was ſuppoſed to be brought from *Holland*, during the War; and in *London* dyed the week before 7165. of the Plague; and in all 8297. beſide Papiſts, Quakers, and ſome others that were not put into the Bill of Martality. See *Hutt.* 129.

DE TERMINO Sancti Hillarii,

17 & 18 *Car.* II. *B. R.* Anno 1665.

Memorandum, That this Term alſo, by reaſon of the Plague, was Adjorn'd by Proclamation dated at *Oxon*, *Friday Jan.* 12. in and from the firſt to the third Retorn of *Cras purific. Saturday Febr.* 3. to be held at *Windſor Caſtle*, publiſhed at *London Jan.* 18. by occaſion of a ſmall Increaſe of the continued Plague, which was 158. and in all 375. which much terrified ſuch as had left their Houſes here, and on *Saturday Febr.* 3. the Judges, *viz.* (1) Adjornment.

Keeling *Chief Juſtice*
Twiſden
Windham
Moreton

ſate accordingly, having given ſtrict Orders no Records of the Plea on Criminal ſide ſhould be removed, and the ſeveral Writs of Adjornment were read on the Eſſoin days, and the Judges ſate till the 4 *die Poſt*, which here was *Tueſday Febr.* 6. at which day by reaſon of the Sickneſs Decreaſing to 227 in all, whereof of the Plague 56. the King removing from *Oxon* to *Hampton Court*, and ſo to *London*, ſent another Writ without any Proclamation, by vertue whereof the Judges then at *Windſor* Adjorn'd to *Weſtminſter* the laſt Retorn, which was to *Friday Febr.* 9. and on that day without reading the Writ proceeded on.

Collingwood

Collingwood *against* Bishop.

(2) Baron & Feme.

IN Trespass for mean profits, it was moved after Verdict for the Plaintiff in Arrest of Judgment, that the Count was against Baron & Feme of Trespass done, cum averijs suis, and doth not say whither they were their Beasts after, or hers before Coverture, and for this Cause Judgment was staid on Allegation of Excessive Damages, in regard the Tenant of the Glebe, who was Defendant in the Action, was charged with the whole Arrears of Rent, and not recount what he had paid, but he that had the Tyths of the Rectory, which were of greater value, only proportioned, which by Windham is well enough: But by Keeling there is no inconvenience that the Tenant should be allowed in Damages for what Fee-ferm he hath paid, and not put him to an Equitable Contribution against the rest; and the Court being divided, the Solicitor proceeded in his exception, which, Wild for the Plaintiff, conceived after Verdict, is good enough, as 3 Cr. Charwells Case, she may be Executrix, and so by Marriage they may be his Goods: But by Finch this cannot be, because for this they cannot be sued, as Herns *against* Palmer, the Actions should have been several, according to their several Capacities. Twisden, If the goods of Executrix after the taking Husband be stolen, the Indictment must be of taking his Goods, but yet this Exception will not hold. Windham, in Debt against one as Executor, and declares that the Testator entred into Bond, and the Issue was non est factum suum which is idle, and being relative shall relate, if it can, if not void; and so after Verdict, Judgment for the Plaintiff, Nisi. 100 l. be brought into Court and Costs paid to the Plaintiff, and then a new Trial Rule by consent.

The King *against* Rhodes.

(3) Certiorari.

HE took out a Certiorari to remove an Indictment of Perjury in the Sessions below, which after the Return expired, the party delivered to the Justices, and they allowed it, and yet proceeded to Trial, which by Ofley, on Dyer 244. they ought not, the Fact being thereby to be removed as well as the Record: But the Court inclined, that nothing can be removed by Certiorari after the Return. 2. On 2 Cr. 239. Canninghans Case, it was moved in Arrest of Judgment, that the Perjury is laid at the Assizes at the Castle of York, and the Venire facias of Ponfract, which is another

another Riding, which per Curiam is ill, but yet the Indictment remains good, and only a new Trial. 2. The Solicitor prayed amendment pro Rege of the Indictment, which per Curiam cannot be, but a new Indictment may be prefer'd at the Assizes, which the Justices will not remove; but in regard this must be found by a new Grand Jury, and doubtful whither they can try it the same Assizes without special Rule of Court: Also for that the Perjury is laid in the West-riding, before Justices of the West-riding, and the Visne is from the Castle of York, and doth not say the Castle of York is in the West-riding, which on Co. Entries 343. is ill, the Court ordered a new Trial by consent at next Assises.

Jackson *against* Adams. Ante.

(4) The Defendant was Arrested by Bill of Middlesex, with an ac etiam of 300 l. Debt, not saying per Contract. or Det. per Oblig'. or super Judicium, which per Curiam is needless.

Reeves *against* Bould.

Saturday, Febr. 10.

(5) Coleman prayed a Prohibition to Suggesting the Lands in question are within the precinct of a Free- Tyths. Chappel within the said Parish, which being excepted for Tyths, and belonging not to the Parson, its all one as the Bounds of a Parish, which are Triable at Common Law: Sed Curia contrà; And by Keeling Chief Justice, this is all one as Will in the same Parish, which is Triable in the Spiritual Court: But contrà, by Windham, of a distinct Will from the Will of the Parish, for here the Right of a third person cometh in question; But in the Case at Bar the Chappel belongs to the Parson, and by the same reason the Right of each particular Ferme would be Triable at Common Law, which without particular custom shall never be, and here only the right of Tyths is questioned: Also a Pension payable by Constitution to a Chappelrie, is not payable at Common Law, and a Prohibition was denied by the whole Court.

In Conusance Br. 7. Grene *against* Symson.

(6) Cognizanc. SIr Ed. Tourner, in Ejectment ore Tenus shewing his Warrant of Attorny, demanded Conusance for the Bishop of Ely, being for Downham, which is his Seat, as Lucas Case in Annuity, H. 7. which, per Curiam is not allowable on Suggestion, but as Cinque Ports, Aunc. Dem. &c. it must be Aver'd on Record, for though the Court take notice that Ely is a Royal Franchis, yet this must be so aver'd or pleaded, and may be after Imparlance, when any third person is concern'd, since the new way of Ejectments used; though for this reason before Conusance was denied in the Case of Neal *against* Denny, and they agreed to enter it accordingly, and prayed a Venire facias of the Franchis, and this may be at any time, but when the Court is to be ousted of Jurisdiction, it must be pleaded. Post. 948. pl. 11.

Russell *against* Cumber.

(7) Execution. ON the Case of Chapman *against* Woodly, in Action upon the Case for laying Pipes to others, and doth not aver that others were laid, yet good after Verdict; so is the Case of Hub. 209. and therefore in this Action upon the Case for Fraudulent omission of Execution of Goods that were in Conspectu suo, not saying that he knew them to be the Goods of the Defendant in that Action; after Verdict it was moved for Judgment, which was Arrested at Oxon for this Omission, and so Keeling conceived now, this being the substance of the Action, contrà, by Twisden and Windham, the gist of the Action is the fraud, which cannot be without notice, which is enwrapt in the Verdict, though it could not be pleaded, which Moreton agreed, the Sheriff being bound to take notice whose Goods they were. Judgment for the Plaintiff, Nisi.

Bond *against* Smyth.

(8) Lieu. WInnington prayed a Prohibition to Inferior Court in Malborough, in account of several Rents Collected, and doth not say Infrà Jurisd. Curiæ; after Verdict, and Judgment quod computet, which Keeling granted, and there is but one Case, and that is on 23 H. 8. 9. of suing out of Diocels, in which Case no Prohibition lieth after Judgment, the parties having there agreed the Jurisdiction, but in all Cases else a Prohibition lieth, as well after Judgment

ment as before, which Twisden agreed, on F. N. B. 45. and 2 Inst. 230. but Windham contrà, it being without president after Judgment, that Prohibition should be granted in any Transitory Actions; Sed curia contrà, and Prohibition granted, Nisi.

Sir Andrew Henley *against* Dr. Burstow.

(9) Peace.

The Defendant being Convicted of a Riot, in Aggravation of his Fine, it was now offered that he had since denied the Plaintiff and his Witnesses the Sacrament, which sheweth his impenitence; but the Court refused to take any notice of the Spiritual matter: But by Maynard for the Plaintiff, an Action upon the Case lieth against him, for refusing the Sacrament, which the Court agreed, on 1 Eliz. cap. because the party is bound to receive on penalty.

Picard *against* the Bishop of Ely and Paiton.

Monday, Febr. 13.

(10) Ordinary. Sider. 276. pl. 3.

ON Recovery of Debt on Fi. fa. directed to the Sheriff into London, he return'd Clericus est beneficiatus in Ely, whereupon went a Fi. fa. to the Bishop, reciting the former, upon which the Bishop return'd Nulla bona Ecclesiastica, because in truth he had let his Parsonage: The Court on Process Br. 14. conceived this Return of the Sheriff of London improper, in regard there should have been a Suggestion on the Roll, after the Return of the Sheriff of London, that the Defendant had Goods in Ely, and the Sheriff of that County should have made this Return of Clericus beneficiatus, Hetly 20 and had the proceeding been thus, an Action upon the case would have lain against the Bishop for his false Return, if the letting or Alienation, or permutation had been after the first Fi. fa. and before the Bishops Return; but as this case is, no Action upon the case lieth, nor would they grant any Process against the Bishop, to make a better Return.

In

In Conusance Br. 7. Ante 946.pl.6.

(11) Cognizance. SIr Ed. Tourner prayed Conusance by Entry, quod Episcopus Ely petit cognitionem in this Action of Ejectment which was grounded on the Book of Entries; Twisden said, he ought to say, That time out of mind he hath had Conusance: But by Keeling one cannot prescribe for Conusance, but may have it by Auncient Grant, and Allowance time out of mind; and such is this Vouching the Record of H.21 Ed. 3. Inter Catherine Anks; but it doth not Vouch the Roll, which was Rot. 21. and therefore the Court would advise before they make this a President. But all agreed that the Court takes notice of Ely for a Royal Franchise; and that had it not been so, he must prescribe on the allowance clearly, and not only Vouch the Record, but also the Roll. See Pl. Com. 143.b. the pleading of Exemption, and yet the Record shall not be sent hence, but only a day appointed below.

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